90-1938

No. _____ (1)

Supreme Court, U.S.
FILED
JUN 21 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE NEW YORK TIMES COMPANY,

Petitioner,

—v.—

LUTHER M. RAGIN, JR., DEBORAH FISH RAGIN, RENAYE B. CUYLER, JEROME F. CUYLER and OPEN HOUSING CENTER, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the prohibition, set forth in the Fair Housing Act, on the publication of real estate advertisements that "indicate[] any preference, limitation, or discrimination" based on minority status, 42 U.S.C. § 3604(c) (1988), may be construed, consistent with the terms of the statute and the First Amendment to the United States Constitution, to impose liability upon a newspaper which has not published any facially discriminatory advertisement, in the absence of extrinsic circumstances demonstrating discriminatory intent or preference by the newspaper.

2. Whether 42 U.S.C. § 3604(c) may be construed, consistent with the terms of the statute and the First Amendment, to impose liability upon a newspaper solely on the basis of a low proportion of minority human models displayed in an advertisement or a series of advertisements created and submitted by unrelated third parties and published in the newspaper.

PARTIES BELOW

The parties before this Court are those set forth in the caption. The National Association for the Advancement of Colored People (NAACP) was also a plaintiff below, but withdrew as a party plaintiff on April 28, 1989.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner The New York Times Company informs the Court that it has no parent company, and no subsidiaries other than wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner The New York Times Company ("The Times") respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on January 23, 1991.

OPINIONS BELOW

There have been three opinions below in this matter, two by the district court and one by the court of appeals. In chronological order, they are:

The memorandum opinion and order of the United States District Court for the Southern District of New York (Haight, J.) (December 18, 1989) (denying The Times's motion to dismiss plaintiffs' claim against it under Section 804(c) of the Fair Housing Act, 42 U.S.C. § 3604(c) (1988) and granting The Times's motion to dismiss claims under Section 804(a) of the Act, 42 U.S.C. § 3604(a) (1988), the Civil Rights Acts of 1866 and 1870, 42 U.S.C. §§ 1981, 1982 (1988), and the Thirteenth Amendment to the United States Constitution) is reported at 726 F. Supp. 953 and is set forth in the Appendix ("App.") to this petition at 20a.

The memorandum opinion and order of the United States District Court for the Southern District of New York (Haight, J.) (March 5, 1990) (granting The Times's motion for certification for interlocutory appeal of that portion of the December 18, 1989 memorandum opinion and order denying The Times's motion to dismiss) is unreported and is set forth in the Appendix at 17a.

The opinion of the United States Court of Appeals for the Second Circuit (January 23, 1991) (affirming that portion of the December 18, 1989 memorandum opinion and order of the United States District Court for the Southern District of New York which denied The Times's motion to dismiss) is reported at 923 F.2d 995 and is set forth in the Appendix at 1a.

JURISDICTION

Jurisdiction of this Court to review the judgment of the Second Circuit entered January 23, 1991 is invoked under 28 U.S.C. § 1254(1) (1988). By order dated April 5, 1991, Justice Marshall extended petitioner's time for filing a petition for a writ of *certiorari* to and including May 22, 1991; by order dated May 10, 1991, petitioner's time was further extended to and including June 21, 1991. Accordingly, this petition is timely filed.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Section 804(c) of the Fair Housing Act of 1968, 42 U.S.C. §§ 3604(c) (1988) ("Section 3604(c)"), provides:

> "[I]t shall be unlawful–
>
> . . .
>
> "(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination."

A regulation issued by the Department of Housing and Urban Development ("HUD"), 24 C.F.R. § 109.30(b) (1990), states:

> "*Use of human models.* Human models in photographs, drawings, or other graphic techniques may not be used to indicate exclusiveness because of race, color, religion, sex, handicap, familial status, or national origin. If models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority and minority groups in the metropolitan area, both sexes, and when appropriate, families with children. Models, if used, should portray persons in an equal social setting and indicate to the general public that the housing is open to all without regard to race, color, religion, sex, handicap, familial status, or national origin, and is not for the exclusive use of one such group."

STATEMENT OF THE CASE

This petition seeks review of a decision by the United States Court of Appeals for the Second Circuit holding that a claim may be asserted against a newspaper publisher under the Fair Housing Act (the "Act"), 42 U.S.C. § 3604(c) (1988), for the publication of an advertisement or a series of advertisements, nondiscriminatory on their face and created and submitted for publication by third parties, solely on the basis of the allegedly low proportion of black human models displayed therein.

The petition arises out of a complaint served on The Times on January 12, 1989 by four black individuals, a not-for-profit housing advocacy organization, and the NAACP.[1] The plaintiffs alleged that during the preceding twenty years, The Times had violated the Fair Housing Act of 1968, the Civil Rights Acts of 1866 and 1870, and the Thirteenth Amendment by publishing real estate advertisements "featuring thousands of human models of whom virtually none were black. . . ." Complaint ¶ 12 (App. 50a). According to the Complaint,

> "the repeated and continued depiction of white human models and the virtual absence of any black human models in the real estate advertisements that the Times has continuously printed and published, or caused to be printed and published throughout the last twenty years, indicates a preference on the basis of race and color in violation of the law.
>
> "The real estate display advertisements featured by the Times indicate a preference based on race through the use of human models reflecting the predominant race of the advertised building, development or community." Complaint ¶¶ 20, 21 (App. 52a).

[1] The Complaint (without exhibits) is set forth in the Appendix at 46a.

The plaintiffs did not allege that The Times itself created or produced the real estate advertisements at issue.[2] They did not identify a single advertisement or advertising campaign printed in The Times that allegedly indicated any discriminatory preference, let alone a preference obvious on the face of any advertisement. They did not allege a single fact, direct or circumstantial, indicating any intent on the part of The Times to convey any such discriminatory preference.[3] Nor did they maintain that any extrinsic circumstances revealed any such discriminatory preference.

Plaintiffs sought a declaratory judgment, injunctive relief, and compensatory and punitive damages. Complaint ¶ 1 (App. 46a). In response, The Times moved under Fed. R. Civ. P. 12(b)(6) to dismiss the Complaint for failure to state a claim upon which relief may be granted.

The District Court Opinions[4]

On December 18, 1989, the district court denied The Times's motion to dismiss plaintiffs' claims under 42 U.S.C. § 3604(c); it granted The Times's motion to dismiss plaintiffs' claims under 42 U.S.C. § 3604(a),[5] 42 U.S.C. §§ 1981 and 1982, and the Thirteenth Amendment.

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[2] The advertisements at issue are submitted to The Times in "camera ready" form by advertisers or advertising agencies. They typically promote sales or rentals in luxury condominiums or developments and may be repeated as part of an advertising campaign. When people are depicted in the advertisements, a single model, a couple, or a family usually appears.

[3] The plaintiffs did allege, in the most conclusory fashion, and without any factual support, that The Times "intentionally and maliciously violated their civil rights." Complaint ¶ 22 (App. 52a)

[4] The district court's jurisdiction was based on 28 U.S.C. §§ 1331, 1337, 1343(a)(4), 2201, and 2202 (1988).

[5] This provision of the Fair Housing Act provides that "it shall be unlawful —

> "(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."

In denying so much of The Times's motion as sought dismissal of the plaintiffs' Section 3604(c) claim, the district court rejected both The Times's constitutional arguments and those rooted in statutory interpretation. Concluding that the Fair Housing Act requires a "fair representation" of models by race – and, presumably, by each of the other factors referred to in Section 3604(c), including religion, sex, handicap, familial status and national origin – the district court denied The Times's motion to dismiss, stating:

> "I do not construe the FHA and the regulations to prohibit *only* the total exclusion of black models. The statute is remedial. So narrow a construction is inappropriate. Between the polar extremes of total exclusion, and strict proportionalism according to population percentages, the proof at trial may show sufficient numbers of black models to achieve fair representation; or such a paucity of black models as to constitute 'tokenism.' The fact-finder could, in my judgment, lawfully conclude that proof of the former does not violate the FHA; but that proof of the latter does offend a statute prohibiting advertisements which indicate a racial preference." 726 F. Supp. 953, 961 (S.D.N.Y. 1989) (App. 34a).

On motion of The Times to certify the issue to the court of appeals under 28 U.S.C. § 1292(b) (1988), the district court amended its order "for the purpose of expressing the opinion that such order involves controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from that order will materially advance the ultimate termination of the litigation." Slip op. at 3 (S.D.N.Y. March 5, 1990) (App. 19a). The Court of Appeals for the Second Circuit permitted the appeal to proceed.

The Opinion of the Court of Appeals

The court of appeals affirmed the district court's denial of The Times's motion to dismiss. Without directly addressing the "fair representation" concept articulated in the district court,

the court of appeals concluded that Section 3604(c) would "be violated if an ad for housing suggests to an ordinary reader that a particular race is preferred or dispreferred for the housing in question." 923 F.2d at 999 (App. 5a-6a). "[A] trier plausibly may conclude," the court determined, "that in some circumstances ads with models of a particular race and not others will be read by the ordinary reader as indicating a racial preference." 923 F.2d at 1000 (App. 8a).

Liability, the court concluded, "may not be based on an aggregation of advertisements by different advertisers." 923 F.2d at 1001-02 (App. 10a). However, "close questions of liability will involve advertisers that either use a large number of models and/or advertise repetitively." *Id.* at 1002 (App. 10a). In such circumstances, the court indicated, a jury may impose liability on a newspaper for its repeated publication of certain advertisements, even when none of them could be deemed to be discriminatory in itself.

The opinion of the court of appeals was entered on January 23, 1991. This petition followed.

REASONS FOR GRANTING THE WRIT

The construction of the Fair Housing Act of the court of appeals is contrary to that of every other court that has interpreted the Act. All other courts that have upheld claims under Section 3604(c) have either required as a matter of law, or have ruled on a record demonstrating, a discriminatory preference in an advertisement or advertising campaign evident on its face or provable by extrinsic circumstances indicating an intent to discriminate. The Second Circuit ruling in this case is at odds with all those rulings.

In holding that the Act imposes a duty on newspaper publishers beyond assuring that the individual advertisements they publish are not overtly discriminatory, the decision of the court below construed the Act to require publishers to go behind the face of any given advertisement to investigate and enforce advertisers' overall compliance with the Act. At the same time,

it subjects newspapers to a standardless jury determination as to which submissions – considered in the aggregate – from each of their advertisers may or may not comply with the Act, a determination limited only by a jury's view as to what conclusion an "ordinary reader" would draw from the presence or absence of more or fewer human models of one or another race, color, religion, sex, handicap, familial status or national origin.

Petitioner does not maintain that newspapers are – or that they constitutionally must be – exempt from the proscriptions of the Fair Housing Act in general, or from 42 U.S.C. § 3604(c) in particular. Newspapers do not have the right to publish real estate advertisements that are discriminatory on their face, or to set policies or engage in practices that reveal discriminatory preferences. The decision of the court below, however, does not merely construe the Act to forbid newspapers from doing so; it also construes the Act to impose strict liability upon newspapers when they fail to predict accurately the determinations of juries (in their roles as "ordinary readers") as to how many disabled models must be depicted in a series of advertisements; how many Asians or Hispanics must be shown in any one advertisement published repeatedly; and how many models of *each* color, sex and nationality must appear in a single advertisement for the sale of a house. Nothing in the language or legislative history of the Act is consistent with such a construction.

The ruling below is not only in conflict with earlier case law, but threatening to First Amendment protections long afforded to the press, *see, e.g., Bigelow v. Virginia*, 421 U.S. 809, 828 n.14 (1975), and to commercial speech, *see, e.g., Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977). It is thus also at odds with deeply-rooted principles of statutory construction, which dictate that statutes should be read so as to avoid potential conflicts with constitutional principles. The ruling of the Second Circuit, unique in the history of interpretation of this statute, is well worthy of plenary review by this Court.

I.

THIS CASE PRESENTS IMPORTANT AND UNRESOLVED ISSUES CONCERNING THE STANDARD FOR IMPOSING LIABILITY ON NEWSPAPERS UNDER SECTION 3604(c) OF THE FAIR HOUSING ACT

This is not the first case in which a newspaper has been accused of violating Section 3604(c) of the Fair Housing Act. By any assessment, however, it is the first in which a court has interpreted the Act so as to permit the imposition of liability on a newspaper for publishing an advertisement which is not overtly discriminatory, although no external circumstances are even alleged to demonstrate any intent to discriminate. The ruling thus stands in stark contrast to those reached in all other cases in which similar claims have been asserted.

When faced with the same issues in a case virtually identical to this one, the United States District Court for the Southern District of Ohio came to precisely the opposite legal conclusion.[6] In *Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 731 F. Supp. 801 (S.D. Ohio 1990), that court held:

> "[A]bsent a showing of intent to indicate a racial preference or of other extrinsic circumstances revelatory of a racial preference, real estate advertisements do not violate the Fair Housing Act of 1968 merely because models of a particular race are not used in one advertisement or in a series of advertisements." 731 F. Supp. at 804.

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[6] The allegations in that case, *Housing Opportunities Made Equal v. Cincinnati Enquirer, Inc.*, 731 F. Supp. 801 (S.D. Ohio 1990), against a newspaper publisher closely tracked the allegations in this one: both complaints alleged that the newspapers for twenty years had published real estate advertisements containing human models, of whom virtually none were black. The procedural postures of the cases were identical: both defendants moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaints, and both district court rulings were on these motions (albeit with opposite conclusions).

it dismissed the complaint in that case for failure to state a cognizable claim for relief.[7]

The standard of publisher liability under Section 3604(c) applied by the district court in the *Cincinnati Enquirer* case — "a showing of intent to indicate a racial preference or of other extrinsic circumstances revelatory of a racial preference" in the absence of overtly discriminatory real estate advertisements, 731 F. Supp. at 804 — is consistent with the approach taken by courts in other circuits in cases against advertisers.

In *Spann v. Colonial Village, Inc.*, 662 F. Supp. 541, 545 (D.D.C. 1987), *rev'd on other grounds*, 899 F.2d 24 (D.C. Cir. 1990), for example, the court held with respect to a Section 3604(c) claim against a real estate developer and an advertising agency whose advertising campaigns, unlike those alleged here, "featur[ed] exclusively white models," 662 F. Supp. at 542, that

> "absent a showing of intent to indicate a racial preference or of other extrinsic circumstances revelatory of a racial preference, real estate advertisements do not violate the Fair Housing Act merely because models of a particular race are not used in one ad or a series of ads." 662 F. Supp. at 546.[8]

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[7] The *Cincinnati Enquirer* case was fully briefed on appeal, and was argued before the United States Court of Appeals for the Sixth Circuit on November 6, 1990. A decision is still pending as of the date of submission of this petition. If that decision affirms the decision of the lower court in that case, the United States Courts of Appeals for the Second and Sixth Circuits will have issued directly conflicting decisions in virtually identical cases raising issues of federal statutory interpretation and constitutional rights. The petitioner respectfully submits that this Court in considering this petition for *certiorari* will be aided by the Sixth Circuit's analysis of these important issues, and requests that the Court defer consideration of this petition for *certiorari* pending the issuance of an opinion by the Sixth Circuit in the *Cincinnati Enquirer* case. *See* R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 5.9, at 274 (6th Ed. 1986).

[8] The view of the Court of Appeals for the District of Columbia on the liability standard set forth in *Spann* is less than clear. Judge Greene's decision in *Spann*

(Footnote continued)

The *Spann* court analyzed prior cases brought under Section 3604(c) and concluded that liability resulted in only two categories of cases. The facts as alleged by the Complaint in this case (like those in the *Cincinnati Enquirer* case) do not fall into either category.

> "When the Congress prohibited advertisements that indicate a discriminatory preference, it could only have intended that the preference be either obvious from the ad itself (as in the *Hunter* case, *supra* [*United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972)]) or that such preference be ascertainable through extrinsic circumstances (as in *Saunders*, *supra* [*Saunders v. General Services Corp.*, 659 F. Supp. 1042 (E.D. Va. 1987)]). Usually the proof of such extrinsic circumstances will implicate an element of discriminatory intent." 662 F. Supp. at 546.

In the first case, *United States v. Hunter, supra,* the Fourth Circuit affirmed a judgment against a newspaper publisher of "a classified advertisement tendering for rent a furnished apartment in what was denominated a 'white home.' " 459 F.2d at 209. The court held this language to be overtly discriminatory, and noted that testimony of the advertisement's author in the

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was reversed on the sole ground that the plaintiffs' claims were not time-barred. *Spann v. Colonial Village, Inc., supra*, 899 F.2d at 35. In *dictum*, the court of appeals cited, apparently with approval, the holding of another opinion in a related *Spann* case that " 'if in real estate advertisements some photographs feature white models, some black models, and some of both, no violation of the [Fair Housing] Act occurs merely because the races are not represented proportionately to population, or because black models are not included in every display, *unless an intention to discriminate is shown by extrinsic evidence.*' " 899 F.2d at 35 n.8 (emphasis added) (quoting *Spann v. Carley Capital Group*, 734 F. Supp. 1, 3 (D.D.C. 1988)). In the same opinion, however, the court observed, also in *dictum*, that the plaintiffs on remand would have to demonstrate "that to a 'reasonable reader the natural interpretation of defendants' advertisements . . . is that they indicate a racial preference' or an intention to make such a preference." 899 F.2d at 29 (citing *Saunders v. General Services Corp.*, 659 F. Supp. 1042, 1058 (E.D. Va. 1987)).

record — that the "white home" phrase was " 'a kindness to colored people. There's no use making them . . . come here when I'm not going to rent to them.' " — revealed his intention to indicate a discriminatory preference. 459 F.2d at 215.

In *Saunders v. General Services Corp., supra,* the District Court for the Eastern District of Virginia held liable under Section 3604(c) a real estate management company which had "treat[ed] black tenants and prospective tenants less favorably than whites," 659 F. Supp. at 1047; breached a conciliation agreement with a fair housing group by not using an equal housing opportunity slogan or logo, 659 F. Supp. at 1050; and instructed its employees "not to photograph blacks in the swimming pool" pictured in its real estate brochure. 659 F. Supp. at 1050.

The opinion of the Second Circuit is in stark contrast to the analysis applied in all the cases thus far decided under Section 3604(c). While paying lip service to the liability standard applied in both the *Spann* and the *Cincinnati Enquirer* cases by stating that it "share[d]" their "general view," the Second Circuit added what it acknowledged were "important qualifications." 923 F.2d at 999 (App. 6a). The first of these was that the Second Circuit "read the [statutory] word 'preference' to describe any ad that would discourage an ordinary reader of a particular race from answering it." 923 F.2d at 999-1000 (App. 6a). The second was that "the intent of the creator of an ad may be relevant to a factual determination of the message conveyed, but the touchstone is nevertheless the message." 923 F.2d at 1000 (citation omitted) (App. 6a). These "qualifications" simply eviscerate the standard applied in other circuits by allowing a jury to determine — without regard to whether a discriminatory preference was evident from the face of an advertisement *or* was ascertainable from any extrinsic circumstances — that an advertisement was nonetheless discriminatory.

The magnitude of the difference between the legal standard set forth by the Second Circuit and those established and enforced within other circuits around the country is self-evident. Publishers within the Second Circuit alone cannot securely print

real estate advertisements that are not facially discriminatory, even if the ads are not published with any intent to convey a discriminatory meaning. Within the Second Circuit alone, publishers must seek somehow to insure that a jury will not determine that any one of the advertisements or advertising series it publishes should have included more human models of a particular ethnicity, for example, or more with a particular handicap. Even if The Times should prevail at trial, the gross inconsistencies between the standard established in the Second Circuit and that in other circuits will remain unless this Court determines which interpretation of Section 3604(c) is correct.

II.

THE COURT OF APPEALS' INTERPRETATION OF SECTION 3604(c) IS INCONSISTENT WITH WELL-ESTABLISHED CANONS OF STATUTORY CONSTRUCTION AND WITH THE FIRST AMENDMENT

In assisting judicial construction of Section 3604(c), a long-standing

> "rule of statutory construction . . . is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988). This principle, one now "beyond debate," *id.*, was applied in *DeBartolo* to reject the National Labor Relations Board's First Amendment-threatening construction of the National Labor Relations Act to prohibit a union's peaceful handbilling at a shopping mall. Similarly, with respect to a First Amendment-based challenge to the exercise of the NLRB's jurisdiction under the NLRA over religious schools, this Court held:

> "The values enshrined in the First Amendment plainly rank high 'in the scale of our national values.' In keeping with the Court's prudential policy it is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions. If so, we must first identify 'the affirmative intention of the Congress clearly expressed' before concluding that the Act grants jurisdiction." *NLRB v. Catholic Bishop*, 440 U.S. 490, 501 (1979).

And in the context of an obscenity proceeding against a newspaper on the basis, *inter alia*, of its publication of advertisements by photographers offering nude photos for sale, this Court, "[i]n the constitutional climate in which this [obscenity] statute finds itself," "hesitate[d] to attribute to Congress a purpose to render a publisher civilly responsible for the innocuous advertisements of the materials of others, in the absence of any showing that he knew that the character of such materials was offensive," and refused to do so. *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 492 (1962). *See also Rust v. Sullivan*, 59 U.S.L.W. 4451, 4456 (U.S. May 23, 1991) (Nos. 89-1391, 89-1392) (to be reported at 111 S. Ct. 1759) (acknowledging the *DeBartolo* canon of construction, but concluding that in the context of a federal funding statute, limitations on abortion counselling did "not raise the sort of 'grave and doubtful constitutional questions' that would lead [the Court] to assume Congress did not intend to authorize their issuance") (citation omitted).[9] Thus, absent a demonstration of an " 'affirmative intention of the Congress clearly expressed' " to enact a statute that raises "serious constitutional questions" in the First Amendment area, Section 3604(c) should not be so interpreted. *NLRB v. Catholic Bishop, supra*, 440 U.S. at 501.

Here, not only is there an absence of any such "affirmative intention" of Congress, but the legislative history of Section

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[9] *See also* 59 U.S.L.W. at 4460 (Blackmun, J., dissenting); 59 U.S.L.W. at 4465 (Stevens, J., dissenting); *id.* (O'Connor, J., dissenting).

3604(c) indicates an opposite intention. While little was said about the Section in hearings or debate on the Fair Housing Act, *all* the examples of which petitioner is aware cited with respect to newspaper advertisements were of overtly discriminatory listings, such as "a private community" or "with club membership you become eligible to buy," *Fair Housing Act of 1967: Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 386-89 (1967) (Testimony of George Meany), or "house is near a parochial school." *Id.* at 344 (Testimony of Alan L. Emlen). Such listings were described by Senator Mondale, one of the sponsors of the bill, as those which "quite obviously permit[ ] realtors to conduct a conscious policy of discrimination through not very subtle means." *Id.* at 391. *See also To Prescribe Penalties for Certain Acts of Violence or Intimidation: Hearings on H. Res. 1100 Before the House Comm. on Rules*, 90th Cong., 2d Sess. 57 (1968) (Testimony of Rep. Celler, another sponsor, that "this statute provides for sanctions and will be precisely and exactly construed" without "inferences" that are "broad").[10]

The Second Circuit's construction of the Act to permit a "claim of an illegal racial preference . . . based solely upon the use of models and not upon more directly offensive racial messages,"

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[10] Regulations adopted by HUD indicate that in some circumstances, human models may "be used to indicate exclusiveness." 24 C.F.R. § 109.30(b). Those regulations, in so far as they are relevant, are precatory in nature. *See* 24 C.F.R. § 109.10 (1990) ("[t]he purpose of this part is to assist all advertising media . . . to make, print, or publish . . . advertisements with respect to the sale, rental, or financing of dwellings which are in compliance with the requirements of the Fair Housing Act."). HUD itself recognized "the limitations which the First Amendment may impose on mandatory restrictions relating to the publication of advertising." Dep't Housing and Urban Development, Preamble to Final Rule, 45 Fed. Reg. 57102 (1980). The Second Circuit, in any event, did not base its interpretation of Section 3604(c) on the HUD regulations, noting that "[t]he agency is not attempting to enforce the regulation [§ 109.30(b)] in the instant matter. . . ." 923 F.2d at 1000n.1 (App. 7a). As a result, no issue is raised in this action of an enforcing agency's construction of a statute. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

923 F.2d at 1005 (App. 16a), is thus at odds with the Congressional understanding that Section 3604(c) prohibited overtly or consciously discriminatory advertising. Moreover, it has grave First Amendment consequences.

The decision below simply ignores the difference — one of constitutional dimension — between forbidding newspapers to publish ads discriminatory on their face and requiring newspapers to shape the content of their real estate advertising sections to achieve a government-mandated goal. The Second Circuit's construction of the statute necessarily compels newspapers to avoid liability by imposing on their advertisers mandatory percentages for each minority group — handicapped, Asians, Jews and others. In doing so, it strikes directly at long-established First Amendment interests. "We know from experience that 'liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper.' " *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975) (citation omitted).

That it is The Times's advertising section, and not its news section, that is at issue here does not dispose of the First Amendment concerns raised by the Second Circuit's reading of the statute. As the *Cincinnati Enquirer* case concluded:

> "Section 3604(c) cannot be construed to require a newspaper to evaluate the racial proportions of its advertising pages. The chilling effect of such a burden implicates First Amendment concerns. *See Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975)." 731 F. Supp. at 804-05.

In similar fashion, federal courts in circuits around the country have held that legislative or judicial intrusions into the decisions of newspapers as to which advertisements to print are constitutionally prohibited. *See, e.g., News & Sun-Sentinel Co. v.*

Board of County Commissioners, 693 F. Supp. 1066, 1071-72 (S.D. Fla. 1987) (local criminal ordinance forbidding newspapers from publishing contractors' ads without including their certificate of competency numbers held an impermissible "intrusion on editorial judgment and control"); *Memphis Publishing Co. v. Leech*, 539 F. Supp. 405, 410 (W.D. Tenn. 1982) (statute requiring newspapers to publish a warning in alcohol advertisements "improperly intrudes on editorial discretion" by offering only a "forced choice between foregoing copy or publishing that which would not otherwise be published"); *see also Sinn v. Daily Nebraskan*, 829 F.2d 662, 666 (8th Cir. 1987) (college newspaper's refusals to publish roommate wanted ads that identified the sexual orientations of the advertisers were protected "editorial decisions"); *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976) (affirming trial court's refusal to compel university newspaper to publish homosexual group's advertisement on ground that "the First Amendment interdicts judicial interference with the editorial decision").

The reality of these First Amendment-rooted concerns as applied here is illustrated by comparing the situation in *United States v. Hunter, supra* — in which the Fourth Circuit observed that "a publisher can *readily* determine *from the face* of an advertisement whether it is intended to express a discriminatory preference," 459 F.2d at 213 (emphasis added) — with the instant case. Here, although the Second Circuit did not directly address the "fair representation" concept articulated by the district court, its reading of the statute to permit a finding of liability "merely because models of a particular race were not used in one advertisement or in a series of advertisements," *Housing Opportunities Made Equal v. Cincinnati Enquirer, supra*, 731 F. Supp. at 803, necessarily compels newspapers to investigate whether their advertisers are achieving some mandatory (but unknown) proportion of minority models. Few courts, in the discrimination context or any other, have been willing, as the Second Circuit did here, to place so constitutionally dubious a burden on newspapers. In *Manual Enterprises v. Day, supra*, for example, this Court recognized that

> "publishers cannot practicably be expected to investigate each of their advertisers, and since the economic consequences of an order barring even a single issue of a periodical from the mails might entail heavy financial sacrifice, a magazine publisher might refrain from accepting advertisements from those whose own materials could conceivably be deemed objectionable by the Post Office Department. This would deprive such materials, which might otherwise be entitled to constitutional protection, of a legitimate and recognized avenue of access to the public." 370 U.S. at 493.

In the *Cincinnati Enquirer* case, the court held that the proposed burden in the Section 3604(c) context of "[r]equiring real estate advertisers, let alone news publications, to determine the racial mix of the population within the boundaries of their target market in advance of publishing an advertisement [was] . . . an unrealistic and onerous duty to predict a market fraught with variables." 731 F. Supp. at 804 n.2.[11]

Moreover, imposing such a duty on newspapers would impermissibly shift the burden of enforcing the Fair Housing Act from HUD and federal prosecutors to the media. *See Bigelow v. Virginia, supra*, 421 U.S. at 828 ("[t]he prosecution thus incurred more serious First Amendment overtones" where "statute was applied against [appellant] as publisher and editor of a newspaper, not against the advertiser or a referral agency or a practitioner" of abortion services). In *News & Sun-Sentinel*

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[11] Other lower courts have also been understandably reluctant to hold newspapers to similarly burdensome duties in non-discrimination cases. *See Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 835 (5th Cir. 1989) (refusing to "require[ ] publishers to recognize ads that 'reasonably could be interpreted as an offer to engage in illegal activity' based on their words or 'context' and refrain from printing them"); *News & Sun-Sentinel Co. v. Board of County Commissioners, supra*, 693 F. Supp. at 1073 (burden placed on newspapers to investigate advertisers is a "threat . . . not only to the ability of [newspapers] to publish and distribute their material, but, ultimately, to the institutional viability of the press as a whole").

Co. v. Board of County Commissioners, supra, the district court held:

> "The proper functioning of the press can also be threatened . . . when legislation . . . impairs in any significant way its ability to publish and distribute its material. Such legislation can act to muzzle or curb the press as effectively as the censor, whether it be accomplished through differential taxation, . . ., or, as in this case, *shifting the burden of enforcing the law from the taxpayer to the press.* This does not mean that the press cannot be subjected to generally applicable economic regulations, but that the press may not be singled out to bear special burdens." 693 F. Supp. at 1072 (emphasis added).

Under the Second Circuit's reading of Section 3604(c), it would not only fall to The Times to play the role of law-enforcer, but no standards have been established as to how it must do so. As a result, the statute as construed by the court below is so vague as to be unenforceable. Given the Second Circuit's reading, neither The Times nor any other newspaper can avoid future claims under Section 3604(c) unless it insures that its advertisers include some undefinable proportion of human models of particular religions, colors, national origins, etc. in each advertisement or series of advertisements submitted for publication. At the same time, the precise proportion of such models that must be included is both unknown and unknowable. If the Second Circuit's construction stands, newspapers may well be compelled to protect themselves by rejecting all real estate advertisements that include human models for fear of violating the sensibilities of any potential plaintiff (or juror) whose particular minority group did not happen to be included (or included in sufficient number) in an advertisement or advertising campaign. Because Section 3604(c), as construed by the Second Circuit, may impose liability solely on the basis of the absence of human models of particular races, religions, or other minority groups, it is not just

> "open to one or a few interpretations, but to an indefinite number. . . . It is fictional to believe that

> anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the [requirement] within the bounds of permissible constitutional certainty." *Baggett v. Bullitt*, 377 U.S. 360, 378 (1964).

See also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) ("[p]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected speech. If, for example, the law interferes with the right of free speech or association, a more stringent vagueness test should apply"); *Penny Saver Publications, Inc. v. Village of Hazel Crest*, 905 F.2d 150, 155 (7th Cir. 1990) (local fair housing ordinance concerning "solicitation" by real estate advertisers held "impermissibly vague because it failed to inform the advertisers of the specific conduct that would render them liable").

The importance of the First Amendment principles at stake in this case has been emphasized by this Court even in the context of commercial speech and even when that speech was restricted by a regulation designed to promote racial integration in housing. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977), this Court struck down a local ordinance banning residential "for sale" signs, notwithstanding "the vital goal this ordinance serves: namely, promoting stable, racially integrated housing." 431 U.S. at 94. In doing so, it concluded that " '[r]egardless of the particular label [given to the speech at issue] . . . a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.' " 431 U.S. at 91 (citation omitted).

The narrow holding of this Court in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), that a local ordinance constitutionally could forbid newspapers from carrying advertisements in columns the newspaper itself identified by the sex of the job-seeker, is no authority for the overcoming of First Amendment interests here. The Court in *Pittsburgh Press* explained,

> "it was the newspaper's *policy* of allowing employers to place advertising in sex-designated columns without regard to the exceptions or exemptions placed in the Ordinance, *not its treatment of particular want ads*, which was challenged in the complaint and was found by the Commission and the courts below to be violative of the Ordinance." 413 U.S. at 390 n.14 (emphasis added in part).

It was, as this Court observed, "[t]he *combination*, which conveys essentially the same message as an overtly discriminatory want ad," *id.* at 388 (emphasis added), of the sex-designated employment columns (created by the newspaper) with the want ads (created by the advertiser) that the Court held could be enjoined. In fact, this Court was explicit in its conclusion that "[n]othing in the modified order or the opinions below prohibits the newspaper from relying in good faith on the representation of an advertiser that a particular job falls within an exception to the Ordinance." *Id.* at 391 n.14.

The Second Circuit nonetheless dismissed all First Amendment considerations on the ground that "[g]iven that Congress' power to prohibit [discriminatory] speech is unquestioned, reliance upon the statute to determine the illegality of ads with a racial message is . . . inexorable." 923 F.2d at 1003 (App. 13a). This reasoning misses the point. That Congress has the power to prohibit discriminatory speech hardly means that Congress — or the courts in their interpretive role — may ban speech that is not discriminatory by simply characterizing it as if it were. Moreover, one of the very questions raised by this case is how Section 3604(c) should be read as a matter of law — in particular, whether it should be read to make a newspaper's neutral publication of third parties' facially nondiscriminatory advertisements unlawful where there are no facts allegedly showing the newspaper's intent to discriminate and no extrinsic circumstances allegedly revealing a discriminatory preference. As set forth above, the First Amendment assists in answering that question by encouraging a reading of Section 3604(c) which is more rather than less consistent with principles of free expression.

For all the above reasons, the interpretation by the Second Circuit of Section 3604(c) is at odds both with well-established canons of statutory construction and with the First Amendment itself. Given these factors in a case in which the construction by the Second Circuit is also inconsistent with the interpretation in other circuits, the case is well worthy of review.

CONCLUSION

The petition for a writ of *certiorari* should be granted. Prior to considering the petition, however, petitioner urges the Court to await the ruling of the Court of Appeals for the Sixth Circuit in the *Cincinnati Enquirer* case discussed herein.

Dated: New York, New York
June 21, 1991

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 226 — August Term, 1990

(Argued: October 17, 1990

Decided: January 23, 1991)

Docket No. 90-7389

LUTHER M. RAGIN, JR., DEBORAH FISH RAGIN, RENAYE B. CUYLER, JEROME F. CUYLER and OPEN HOUSING CENTER, INC.,

Plaintiffs-Appellees,

—v.—

THE NEW YORK TIMES COMPANY,

Defendant-Appellant.

Before:

OAKES, *Chief Judge,*
LUMBARD and WINTER, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York (Charles S. Haight, Jr., *Judge*) denying a motion to dismiss the complaint. We reject the Times's statutory and constitutional arguments and hold that the complaint states a claim for relief under the Fair Housing Act based on the alleged use of models in advertisements for housing to indicate a racial preference.

Affirmed.

DEBORAH R. LINFIELD, New York, New York (Solomon B. Watson IV, Cynthia H. Augustine, George Freeman, Kenneth A. Richieri, The New York Times Company, Legal Department, New York, New York, of counsel), *for Defendant-Appellant.*

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FLOYD ABRAMS, New York, New York (Amy Glickman, Cahill Gordon & Reindel, New York, New York, Richard J. Tofel, New York, New York, Lawrence J. Aldrich, Arlington, Virginia, Alberto Ibarguen, Melville, New York, Joseph P. Thornton, David Hiller, New York, New York, Laura Handman, Lankenau & Bickford, New York, New York, John D. Kutzer, Albany, New York, René P. Milam, Washington, D.C., of counsel), *for Amici Curiae Dow Jones & Company, Inc., Gannett Company, Inc., Newsday, Inc., New York Daily News, VV Publishing Corp., New York Newspaper Publishers Association, Inc., American Newspaper Publishers Association.*

WINTER, *Circuit Judge*:

The New York Times Company ("the Times") appeals under 28 U.S.C. § 1292(b) from the denial of its motion under Fed. R. Civ. P. 12(b)(6) to dismiss the complaint in the instant matter. Briefly stated, the complaint alleges that, during the past twenty years, the Times has published real estate advertisements "featuring thousands of human models of whom virtually none were black," and that the few blacks depicted rarely represented potential home buyers or renters. On those rare occasions when

blacks were depicted as consumers of housing, moreover, the housing in question was in predominantly black areas. Plaintiffs contend that by publishing these advertisements the Times has violated the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 *et. seq.* (1988), as amended. Because Section 3604(c) validly prohibits the publication of real estate ads that "indicate[ ] any preference . . . based on race," and the complaint can fairly be read to allege that the Times has published such ads, we affirm the denial of the motion to dismiss.

BACKGROUND

The Times is the publisher of *The New York Times*, a nationally known newspaper. The individual plaintiffs are black persons who have been looking for housing in the New York metropolitan area. Plaintiff Open Housing Center, Inc., is a not-for-profit New York corporation, one of the primary goals of which is to eliminate racially discriminatory housing practices.

On January 12, 1989, plaintiffs commenced this action under the Fair Housing Act, 42 U.S.C. § 3604(a) and (c), the Civil Rights Act of 1866, 42 U.S.C. § 1982 (1988), the Civil Rights Act of 1870, 42 U.S.C. §1981 (1988), and the Thirteenth Amendment. Plaintiffs sought a declaratory judgment, injunctive relief, and compensatory and punitive damages. A pertinent excerpt from the complaint states:

> During the twenty year period since the Act was passed . . . advertisements appeared in the Sunday Times featuring thousands of human models of whom virtually none were black. . . . [W]hile many of the white human models depict representative or potential home owners or renters, the few blacks represented are usually depicted as building maintenance employees, doormen, entertainers, sports figures, small children or cartoon characters . . . .
>
> • • •

> [T]he Times has continued to . . . publish numerous advertisements that picture all-white models in advertisements for realty located in predominantly white buildings, developments, communities or neighborhoods. It has also . . . published a few advertisements that picture all black models in advertisements for realty located in predominantly black buildings, developments, communities or neighborhoods.
>
> The use of human models in advertising personalizes the advertisements and encourages consumers to identify themselves in a positive way with the models and housing featured. In real estate advertisements, human models often represent actual or potential purchasers or renters, or the type of potential purchasers or renters that the real estate owner has targeted as desirable occupants.
>
> Therefore, the repeated and continued depiction of white human models and the virtual absence of any black human models . . . indicates a preference on the basis of race . . . .
>
> The real estate display advertisements featured by the Times indicate a preference based on race through the use of human models reflecting the predominant race of the advertised building, development or community.

The Times moved under Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief may be granted. Judge Haight dismissed the claims based on the Thirteenth Amendment and Sections 1981 and 1982. *See Ragin v. The New York Times Co.*, 726 F. Supp. 953, 965 (S.D.N.Y. 1989). He also dismissed the claim based on Section 3604(a). *See id.* at 956. Plaintiffs have not sought leave to appeal from the dismissal of these claims.

With respect to the claim under Section 3604(c), Judge Haight denied the motion to dismiss. Responding to the Times's arguments, he first concluded that the pattern of ads alleged in the complaint, if proven at trial, would be sufficient to support a finding that the Times had published ads that indicated a racial preference. *See id.* at 956-62. Second, Judge Haight concluded that the First Amendment provides no protection for such illegal commercial speech, and that requiring the Times to monitor the ads it receives would not impose an unconstitutional burden on the press. *See id.* at 962-64. Finally, assuming for purposes of his decision that the constitutional vagueness doctrine was applicable to civil actions involving commercial speech, Judge Haight concluded that the statute gave the Times constitutionally adequate notice of the prohibited conduct. *See id.* at 964-65.

The Times's appeal is pursuant to Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1292(b).

DISCUSSION

Like any party moving to dismiss a complaint under Fed. R. Civ. P. 12(b)(6), the Times must carry the burden of showing that "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Given the breadth of the facts alleged in the complaint, most of the Times's statutory and constitutional arguments amount to an assertion of immunity from Section 3604(c). We reject those arguments.

A. *Statutory Issues*

Section 3604(c) states in pertinent part that it is unlawful:

> To . . . publish . . . any . . . advertisement, with respect to the sale or rental of a dwelling that indicates any preference . . . based on race . . . .

Beginning our analysis with the statutory language, the first critical word is the verb "indicates." Giving that word its common meaning, we read the statute to be violated if an ad for

housing suggests to an ordinary reader that a particular race is preferred or dispreferred for the housing in question. This standard has been adopted by the Fourth, *see United States v. Hunter*, 459 F.2d 205, 215 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972), and District of Columbia Circuits, *see Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990), and we also adopt it.

The second critical word is the noun "preference." The Times asks us to read that word to preclude liability for a publisher where the ad in question is not facially discriminatory and the publisher has no other evidence of a discriminatory intent. We share that general view but with important qualifications.

The Times's conception of what kinds of ads might be deemed by a trier of fact as facially suggesting to an ordinary reader a racial preference is intolerably narrow. At oral argument, suggested as examples of such a facial message were real estate advertisements depicting burning crosses or swastikas. We do not limit the statute — not to say trivialize it — by construing it to outlaw only the most provocative and offensive expressions of racism or statements indicating an outright refusal to sell or rent to persons of a particular race. Congress used broad language in Section 3604(c), and there is no cogent reason to narrow the meaning of that language. Ordinary readers may reasonably infer a racial message from advertisements that are more subtle than the hypothetical swastika or burning cross, and we read the word "preference" to describe any ad that would discourage an ordinary reader of a particular race from answering it.

Moreover, the statute prohibits all ads that indicate a racial preference to an ordinary reader whatever the advertiser's intent. To be sure, the intent of the creator of an ad may be relevant to a factual determination of the message conveyed, *see Saunders v. General Services Corp.*, 659 F. Supp. 1042, 1059 (E.D. Va. 1987), but the touchstone is nevertheless the message. If, for example, an advertiser seeking to reach a group of largely white consumers were to create advertisements that discouraged potential black consumers from responding, the statute would bar the ads, whether or not the creator of the ad had a subjective racial intent.

Keeping these general, and fairly obvious, propositions in mind, we turn to the allegations of the complaint. Those allegations focus upon the use of models of particular races in real estate advertisements. A threshold question is whether Section 3604(c) reaches the use of models as a medium for the expression of a racial preference. We hold that it does. Congress prohibited all expressions of racial preferences in housing advertisements and did not limit the prohibition to racial messages conveyed through certain means. Neither the text of the statute nor its legislative history suggests that Congress intended to exempt from its proscriptions subtle methods of indicating racial preferences.[1]

The next question is whether and in what circumstances the use of models may convey an illegal racial message. We begin with another proposition that seems to us fairly obvious: namely,

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[1] We draw additional support in this regard from a regulation issued by the Department of Housing and Urban Development ("HUD"). This regulation, which was promulgated pursuant to HUD's statutory authority to enforce the Fair Housing Act and based on Section 3604(c), states:

> *Use of human models.* Human models in photographs, drawings, or other graphic techniques may not be used to indicate exclusiveness because of race, color, religion, sex, handicap, familial status, or national origin. If models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority and minority groups in the metropolitan area, both sexes, and, when appropriate, families with children. Models, if used, should portray persons in an equal social setting and indicate to the general public that the housing is open to all without regard to race, color, religion, sex, handicap, familial status, or national origin, and is not for the exclusive use of one such group.

24 C.F.R. § 109.30(b) (1990). Emphasizing the use of the word "should," the Times urges that the HUD regulation is purely precatory and lacks the force of law. We need not pause to probe this issue, however. The agency is not attempting to enforce the regulation in the instant matter, and we rely on it solely as additional support for the view that racial messages conveyed by the use of human models are not exempted.

that a trier of fact could find that in this age of mass communication and sophisticated modes of persuasion, advertisers target as potential consumers groups with certain racial as well as other characteristics. In some circumstances, such targeting conveys a racial preference, or so a trier might find. We live in a race-conscious society, and real estate advertisers seeking the attention of groups that are largely white may see greater profit in appealing to white consumers in a manner that consciously or unconsciously discourages non-whites. They may do so out of simple inertia or because of the fear that the use of black models will deter more white consumers than it attracts black consumers. In any event, a trier plausibly may conclude that in some circumstances ads with models of a particular race and not others will be read by the ordinary reader as indicating a racial preference.

The Times does not deny that advertisers target groups but rather vigorously presses the claim that if Section 3604(c) is applied to the Times, the specter of racially conscious decisions and of racial quotas in advertising will become a reality. We need not enter the public debate over the existence or merits of racial quotas in fields other than advertising, or look to the scope of Supreme Court decisions that permit race-conscious decisions. *See, e.g., Metro Broadcasting, Inc. v. Federal Communications Comm.*, 110 S. Ct. 2997 (1990); *United Steelworkers v. Weber*, 443 U.S. 193 (1979). Nor do we by any means suggest that an order directing such quotas is the only appropriate or usual remedy should a publisher be found liable.

We do believe, however, that the Times's concerns are overblown. The quota controversy principally concerns selection of persons for competitive opportunities, such as employment or admission to college. These are circumstances in which opinions differ whether individual skills or purely academic qualifications should govern and whether a race-conscious decision is itself an act of racial discrimination. The use of models in advertising, however, involves wholly different considerations. Advertising is a make-up-your-own world in which one builds an image from scratch, selecting those portrayals that will attract targeted consumers and discarding those that will put them

off. Locale, setting, actions portrayed, weather, height, weight, gender, hair color, dress, race and numerous other factors are varied as needed to convey the message intended. A soft-drink manufacturer seeking to envelop its product in an aura of good will and harmony may portray a group of persons of widely varying nationalities and races singing a cheerful tune on a mountaintop. A chain of fast-food retailers may use models of the principal races found in urban areas where its stores are located. Similarly, a housing complex may decide that the use of models of one race alone will maximize the number of potential consumers who respond, even though it may also discourage consumers of other races.

In advertising, a conscious racial decision regarding models thus seems almost inevitable. All the statute requires is that in this make-up-your-own world the creator of an ad not make choices among models that create a suggestion of a racial preference. The deliberate inclusion of a black model where necessary to avoid such a message seems to us a far cry from the alleged practices that are at the core of the debate over quotas. If race-conscious decisions are inevitable in the make-up-your-own world of advertising, a statutory interpretation that may lead to some race-conscious decisionmaking to avoid indicating a racial preference is hardly a danger to be averted at all costs.

Moreover, the Times's argument would prevent a trier of fact from scrutinizing the selection of models and inferring from that selection and from the surrounding circumstances a race-conscious decision. The creator of an ad may testify, "Gosh, I didn't notice until this trial that all the models for tenants were white and the model for a custodian was black." However, a trier may justifiably disbelieve such an assertion in light of all the circumstances, much as triers of fact are allowed to draw inferences of racial intent in other contexts, *see, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (setting forth circumstances that justify an inference of racial discrimination in employment), or may consider such an assertion an inadvertent or unconscious expression of racism.

Given this scope for fact-finding, the present complaint cannot be dismissed for failure to state a claim for relief. It alleges a long-standing pattern of publishing real estate ads in which models of potential consumers are always white while black models largely portray service employees, except for the exclusive use of black models for housing in predominantly black neighborhoods. Finally, it alleges that this pattern reflects a targeting of racial groups. Given the ordinary reader test, it can hardly be said that these allegations are insufficient to enable plaintiffs to prove that the Times has published, and continues to publish, some discriminatory ads.

In the proceedings to follow, the standard for liability will no doubt be sharpened in the context of the parties' evidentiary submissions. We believe it useful to make some preliminary observations on that standard, however. First, we agree with the Times that liability may not be based on an aggregation of advertisements by different advertisers. Although the twenty-year pattern alleged in the complaint may have been a powerful engine for housing segregation and, if proven, will almost certainly include violations of Section 3604(c), the statute provides a prohibition only with regard to individual advertisers.

Second, as stated, liability will follow only when an ordinary reader would understand the ad as suggesting a racial preference. The ordinary reader is neither the most suspicious nor the most insensitive of our citizenry. Such a reader does not apply a mechanical test to every use of a model of a particular race. An ad depicting a single model or couple of one race that is run only two or three times would seem, absent some other direct evidence of an intentional racial message, outside Section 3604(c)'s prohibitions as a matter of law. A housing complex that runs ads several times a week for a year depicting numerous white models as consumers and black models as doormen or custodial employees would have difficulty persuading a trier of fact that its ads did not facially indicate a racial preference. It thus seems inevitable that the close questions of liability will involve advertisers that either use a large number of models and/or advertise repetitively. In such cases, the advertiser's opportunities to include all groups are greater, and the message

conveyed by the exclusion of a racial group is stronger. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977) (lack of minority line drivers may demonstrate racial discrimination by trucking employer).

B. *Constitutional Issues*

The Times argues that Section 3604(c) is void for vagueness. Even if we indulge in the assumption that the vagueness doctrine applies to civil actions, we believe the ordinary reader standard provides constitutionally adequate notice of the prohibited conduct. As Judge Haight observed, "[t]he 'ordinary reader' is nothing more, but nothing less, than the common law's 'reasonable man': that familiar creature by whose standards human conduct has been judged for centuries." 726 F. Supp. at 964. The Times's argument seems based on an unstated premise either that the selection of models in advertising is entirely random or that publishers of major newspapers lack the sophistication to notice racial messages that are apparent to others. The premise regarding the random selection of models is baseless, and we have more confidence in the perspicacity of publishers than do the Times's lawyers. Of course, close questions will arise, as they do in every area of the law, but we cannot say in the context of a facial challenge to the statute that the ordinary reader test — as Judge Haight noted, not a novel, untried concept — is a hopelessly vague legal standard.

The Times also claims that the district court's interpretation of Section 3604(c) violates the First Amendment. We disagree. Judge Haight held that real estate advertisements that indicate a racial preference "further an illegal commercial activity: racial discrimination in the sale or rental of real estate." 726 F. Supp. at 962. From this premise he concluded that such advertisements are constitutionally unprotected. *See id.* The Times contends that, because the activity being advertised is the rental or sale of realty, a legal activity, the advertisements are entitled to protection as lawful commercial speech. Moreover, the Times describes as "circular" the use of the statute that is subject to constitutional challenge as the ground for determining that the speech in question is illegal.

The Supreme Court has made clear that "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980). It is the informational content of advertising that gives rise to its First Amendment protection. "[C]ommercial messages that do not accurately inform the public about lawful activity" are unprotected. *See id.* The government may, therefore, ban deceptive advertising or "commercial speech related to illegal activity." *Id.* at 563-64.

In *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 378 (1973), the City of Pittsburgh passed an ordinance that outlawed sex discrimination in employment and prohibited any advertisement "indicat[ing]" sex discrimination. Pittsburgh Press was found to have aided the violation of the ordinance by publishing help wanted advertisements in separate, sex-designated columns. The Court held that the sex-designated columns were related to illegal activity and were therefore unprotected commercial speech. The Court concluded that:

> [a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

413 U.S. at 389.

As was the case with the Pittsburgh ordinance prohibiting employment discrimination and ads indicating such discrimination in *Pittsburgh Press*, the Fair Housing Act prohibits discrimination in the sale or rental of housing, *see* 42 U.S.C. § 3604(a), as well as ads that indicate a racial preference, *see id.* § 3604(c). The complaint alleges that the ads in question discourage black people from pursuing housing opportunities by conveying a racial message in much the same way that the sex-designated columns in *Pittsburgh Press* furthered illegal

employment discrimination. The Times's publication of real estate advertisements that indicate a racial preference is, therefore, not protected commercial speech.

We do not agree that in the instant matter it is circular to determine that a particular kind of commercial speech is illegal by reference to the very statute that is the subject of the constitutional challenge. Such circularity would exist only if there were doubt about Congress's power to prohibit speech that directly furthers discriminatory sales or rentals of housing. The Times understandably shrinks from such a bold and fruitless challenge to the Fair Housing Act. Given that Congress's power to prohibit such speech is unquestioned, reliance upon the statute to determine the illegality of ads with a racial message is not circular but inexorable.

The Times also raises a number of arguments concerning purportedly unconstitutional burdens imposed by Section 3604(c). First, the Times argues that enforcement of the Fair Housing Act against newspapers will compromise the unique position of the free press. *See Bigelow v. Virginia*, 421 U.S. 809, 828 (1975) (prosecution of newspaper publisher rather than an advertiser "incur[s] more serious First Amendment overtones"). As the Supreme Court in *Pittsburgh Press* was unable to discern any significant interference with the traditional "protection afforded to editorial judgment and to the free expression of views . . . however controversial," 413 U.S. at 391, so we perceive no disruption of the press's traditional role that will result from prohibiting the publication of real estate ads that, to the ordinary reader, indicate a racial preference.

Second, the Times contends that the press cannot be compelled to act as an enforcer of otherwise desirable laws and that such an obligation imposes unconstitutional special burdens on the press. The Times relies upon *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). *Zauderer*, however, is wholly inapposite. In pertinent part, that decision addressed the constitutionality of a broad prohibition on the use of advertising by lawyers to give unsolicited legal advice and to recommend their own hiring. Although the ads in question were

conceded to be truthful, the State attempted to justify the ban on the grounds that ads of that nature were prone to falsehoods and deception and that separation of the true from the false was so costly as to make a broad prohibition necessary. The Court rejected that argument, observing that "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Id.* at 646. We do not have before us, however, a statutory prohibition on harmless as well as harmful advertising. The ban is on racial messages, and the "would-be regulators," namely the plaintiffs, are entirely willing to bear the burden of proving at trial that the advertisements published by the Times indicated a racial preference. *Zauderer*, therefore, is of no aid to the Times.

Third, returning to the model of the obtuse publisher, the Times asserts that the press is ill-equipped to conduct the monitoring of advertisements that Section 3604(c) requires. There is, however, no support for the factual premise of this argument. Given the facial nature of the Times's challenge to the statute — namely, that the Times need not monitor the use of models in real estate ads at all — we do not address every ambiguous situation that may arise. Indeed, we need only take notice of the monitoring of messages in advertising that the Times presently undertakes.

The Times thus admits that it presently reviews advertising submissions to avoid publishing ads that do not meet its "Standards of Advertising Acceptability." These Standards provide *inter alia*:

The Times will not accept:

1. Generally

> —Advertisements which contains [sic] fraudulent, deceptive, or misleading statements or illustrations.

—Attacks of a personal character.

—Advertisements that are overly competitive or that refer abusively to the goods or services of others.

2. Investments

Advertisements which do not comply with applicable federal, state and local laws and regulations.

3. Occult Pursuits

Advertisements for fortune telling, dream interpretations and individual horoscopes.

4. Foreign Languages

• • • •

5. Discrimination

Advertisements which fail to comply with the express requirements of federal and state laws against discrimination, including Title VII and the Fair Housing Act, or which otherwise discriminate on grounds of race, religion, national origin, sex, age, marital status or disability.

6. Offensive to Good Taste

Indecent, vulgar, suggestive or other advertising that, in the opinion of The Times, may be offensive to good taste.

This list is not intended to include all the types of advertisements unacceptable to The Times. Generally speaking, any other advertising that may cause financial loss to the reader, or injury to his health, or loss of his confidence in reputable advertising and ethical business practices is unacceptable.

Given that this extensive monitoring — for purposes that are both numerous and often quite vague — is routinely performed, it strains credulity beyond the breaking point to assert that monitoring ads for racial messages imposes an unconstitutional burden.

Moreover, the Times's argument is a policy argument that, if accepted, would undermine other civil rights laws. For example, the Times is prohibited by Title VII from discriminating on the basis of race in employment. *See* 42 U.S.C. § 2000e-2 (1988). It thus must monitor those of its employees with the power to hire and fire. Given the intangible and unquantifiable factors that legitimately may be taken into account in employment decisions, Section 3604(c) seems to us to impose a lesser burden of compliance than Title VII.

We do view one of the Times's arguments with a degree of sympathy, although it does not affect the outcome. The individual plaintiffs seek compensatory and punitive damages for emotional injury resulting from the ads in question, and the Times is fearful that such claims from a multitude of plaintiffs might lead to a large number of staggering, perhaps crushing, damage awards that might over time impair the press's role in society. The problem is that a claimant may establish a prima facie case for such damages simply by oral testimony that he or she is a newspaper reader of a race different from the models used and was substantially insulted and distressed by a certain ad. The potential for large numbers of truly baseless claims for emotional injury thus exists, and there appears to be no ready device, other than wholly speculative judgments as to credibility, to separate the genuine from the baseless. However, we do not regard this possibility as a reason to immunize publishers from any liability under Section 3604(c), including injunctive relief. Rather, it is reason to assert judicial control over the size of damage awards for emotional injury in individual cases. Where the claim of an illegal racial preference is based solely upon the use of models and not upon more directly offensive racial messages, we are confident that courts will be able to keep such awards within reason.

Accordingly, the judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LUTHER M. RAGIN, JR., DEBORAH FISH RAGIN, RENAYE B. CUYLER, JEROME F. CUYLER, and OPEN HOUSING CENTER, INC.,	89 Civ. 0228 (CSH)
Plaintiffs,	MEMORANDUM OPINION AND ORDER
— against —	
THE NEW YORK TIMES COMPANY,	
Defendant.	

HAIGHT, District Judge:

By Memorandum Opinion and Order dated December 18, 1989, familiarity with which is assumed, this Court denied the motion of defendant The New York Times Company under Rule 12(b)(6), F. R. Civ. P., to dismiss the complaint for failure to state a claim upon which relief may be granted.

Pursuant to a suggestion in that prior opinion, the parties have addressed in letter briefs whether this Court's December 18, 1989 Opinion and Order should be certified under 28 U.S.C. § 1292(b) for interlocutory appeal to the United States Court of Appeals for the Second Circuit. Defendant urges certification. Plaintiffs oppose it.

The Times, as movant for certification, must demonstrate that this Court's order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . ." § 1292(b); *see McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 849 F.2nd 761, 763 (2nd Cir. 1988).

Recognizing that § 1292(b) certification should be used sparingly, *Gottesman v. General Motors Corp.*, 268 F.2d 194, 196 (2nd Cir. 1959), I nonetheless conclude without difficulty that the Times has demonstrated the requisite criteria in the case at bar.

The proper construction of the Fair Housing Act, 42 U.S.C. § 3604(c), within the particular context of a newspaper publisher's liability, with its attendant First Amendment considerations, present controlling questions of law. I do not agree with plaintiffs that a full evidentiary record must be developed before the questions of law which underlie the case can be identified and addressed. On the contrary: the recent Rule 12(b)(6) motion practice identified those questions of law and addressed them at length, and this Court undertook to decide them. The parties' letter briefs formulate the question in different terms, but these are procedural, even semantic differences which do not affect the substance.

These statutory and constitutional questions are "controlling" because if the Times is correct in its contentions, its motion to dismiss should have been granted. No one denies that discovery in the case will be massive and the litigation lengthy. Accordingly, it follows with equal clarity that "an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . ."

Lastly, I agree that "there is substantial ground for difference of opinion" with respect to the correctness of this Court's December 18, 1989 Order. In saying that, I do not mean to suggest any misgivings of my own. I believed then and believe now that the Order was correct. But the case law construing § 3604(c) is relatively limited, particularly with regard to the interaction of the statute and First Amendment in an action brought against a publisher. In short, substantial grounds for differences of opinion abound in this case. I would have reached that conclusion even if the Times had not called my attention to Chief Judge Rubin's opinion in *Housing Opportunities Made Equal v. The Cincinnati Enquirer, Inc.*, Civil Action C-1-89-728 (S.D. Ohio, decided February 19, 1990), reaching a conclusion contrary to

my own in what appears to be a comparable case (albeit, if I may say so respectfully, without detailed analysis).

I regard the case at bar as an entirely appropriate, perhaps even quintessential case for certification for interlocutory appeal. Accordingly, I amend this Court's Order dated December 18, 1989 for the purpose of expressing the opinion that such order involves controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from that order will materially advance the ultimate termination of the litigation.

I continue the stay of discovery pending the action of the Court of Appeals.

The foregoing is SO ORDERED.

Dated: New York, New York
March 5, 1990

/s/Charles S. Haight, Jr.

CHARLES S. HAIGHT, JR.
U. S. D. J.

Luther M. RAGIN, Jr., Deborah Fish Ragin,
Renaye B. Cuyler, Jerome F. Cuyler, and
Open Housing Center, Inc., Plaintiffs,

v.

THE NEW YORK TIMES COMPANY, Defendant.

No. 89 Civ. 0228 (CSH).

United States District Court,
S.D. New York.

Dec. 18, 1989.

Sherman & Sterling, New York City, for plaintiffs; Kathleen M. Comfrey, Elsie A. Crum, Cheryl Packwood, of counsel.

The New York Times Co., Legal Dept., New York City, for defendant; George Freeman, Deborah R. Linfield, Kenneth A. Richieri, of counsel.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Plaintiffs in this action, Luther M. Ragin, Jr., Deborah Fish Ragin, Renaye B. Cuyler, and Jerome F. Cuyler, allege that they are "black persons and citizens of the United States who have been looking for housing in the New York City Metropolitan area." Complaint, ¶ 4, 5. Plaintiff Open Housing Center is a not-for-profit New York corporation, one of whose purposes "is to promote equal opportunity in housing in the New York metropolitan area." Complaint, ¶ 6.

These plaintiffs have sued defendant The New York Times Company, which publishes a daily newspaper, *The New York Times* (hereinafter collectively "the Times"). Plaintiffs complain

that for over twenty years the Times has printed and published discriminatory display advertisements for the sale or rental of apartments, condominiums, cooperatives and/or single family homes. Plaintiffs make two specific charges. First, although "[a]t least 20% of the population of New York City's five boroughs is black", during this twenty year period "display advertisements appeared in the Sunday Times featuring thousands of human models of whom virtually none were black.... [W]hile many of the white human models depict representative or potential homeowners or renters, the few blacks represented are usually depicted as building maintenance employees, doormen, entertainers, sports figures, small children or cartoon characters." Complaint, ¶ 12. Second, plaintiffs charge the Times with violating logotype requirements contained in federal regulations with respect to real estate display advertisements. The questions of substance addressed in this opinion relate to the first claim.

Plaintiffs seek declaratory and injunctive relief, as well as compensatory and punitive damages. They allege that the Times' advertisements violate Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 *et seq.* (the Fair Housing Act or "FHA"), the Civil Rights Acts of 1866 and 1870, 42 U.S.C. §§ 1981 and 1982 and the Thirteenth Amendment of the United States Constitution.

The Times now moves to dismiss the complaint under Rule 12(b)(6), F.R.Civ.P., for failure to state a claim upon which relief may be granted.

I.

On this motion I assume the truth of the complaint's factual allegations, including those quoted *supra*. That assumption does not extend to conclusory allegations of law.

On or about September 1987, plaintiffs' counsel met with lawyers for the Times and advised them that, in their view, the Times was printing and publishing discriminatory advertisements in violation of the FHA and regulations promulgated thereunder by the United States Department of Housing and Urban Development ("HUD"), as well as in violation of the

earlier civil rights statutes. During that meeting plaintiffs' counsel asked the Times to sign an agreement similar to one that comparable plaintiffs in the Washington, D.C. metropolitan area had obtained from *The Washington Post*. A copy of that agreement appears as Exhibit 1 to the complaint at bar. The Times refused to enter into such an agreement. Complaint, ¶ 14.

On or about February 16, 1988, the Times published a notice addressed to all advertisers who placed advertisements in the newspaper. Complaint, ¶ 15. That notice, a copy of which appears as Exhibit 2 to the complaint, recites the receipt by the Times of complaints "that certain real estate advertising published in the Times does not comply with federal and state fair housing laws and regulations"; proclaims its belief "that our policies must reflect both the requirement and spirit of the fair housing laws"; and then says in part:

> Effective January 1, 1988, the Times will require that all real estate display ads include the "Equal Housing Opportunity" tag line recommended by the federal regulations. Ads which fail to include this statement will be rejected.

At the same time the Times published a pamphlet of its standards for acceptable advertising. Complaint, ¶ 16. A copy appears as Exhibit 3 to the complaint. In that pamphlet the Times stated that it would not accept, *inter alia:*

> Advertisements which fail to comply with the express requirements of federal and state laws against discrimination, including Title VIII and the Fair Housing Act, or which otherwise discriminate on grounds of race, religion, national origin, sex, age, marital status or disability.

The complaint goes on to allege that since February 1988 the Times has not asked advertisers to stop submitting real estate advertising campaigns with all-white human models. On the contrary, the Times has continued to print or publish advertisements that contain "virtually all white human models and

that violate the size standards for Equal Housing Opportunity logotypes." The Times has also "continued to print and publish numerous advertisements that picture all-white models in advertisements for realty located in predominantly white buildings, developments, communities or neighborhoods. It has also printed and published a few advertisements that picture all black models in advertisements for realty located in predominantly black buildings, developments, communities or neighborhoods." Complaint, ¶ 19. That use of human models in advertising "personalizes the advertisements and encourages consumers to identify themselves in a positive way with the models and housing featured", in that "human models often represent actual or potential purchasers or renters, or the type of potential purchasers or renters that the real estate owner has targeted as desirable occupants." *Ibid.* "In consequence, the repeated and continued depiction of white human models and the virtual absence of any black human models" in these real estate advertisements "indicates a preference on the basis of race and color", *id.*, ¶ 20. The individual plaintiffs allege that they "have looked at human model real estate advertisements in *The New York Times* and have been injured and offended by those advertisements due to their clear indication of a preference, limitation, and discrimination based on race." *Id.*, ¶ 23. The institutional plaintiff alleges that the Times' preferential advertising has "interfered" with its objectives. *Id.*, ¶ 25.

II.

Plaintiffs allege that by this conduct the Times has violated those provisions of the FHA found at 42 U.S.C. § 3604(a) and (c), as well as the Civil Rights Acts of 1866 and 1870, 42 U.S.C. §§ 1981 and 1982, and the Thirteenth Amendment.

Congress enacted the FHA in 1968. In § 3604, the Act makes it unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny,

a dwelling to any person because of race, color, religion, sex, or national origin.

* * * * * *

(c) To make, print or publish, or cause to be made, printed, or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or any intention to make any such preference, limitation, or discrimination.

HUD, the agency charged with implementing the FHA, issued "Advertising Guidelines for Fair Housing" in 1972. In 1980 HUD promulgated regulations, 24 C.F.R. Part 109, which constitute "a reissuance in regulation form of the Advertising Guidelines for Fair Housing, with certain revisions." 45 Fed.Reg. at 57102. The HUD regulations state in pertinent part, at § 109.30(a) and (b):

(a) *Use of Equal Housing Opportunity logotype, statement, or slogan.* All advertising of residential real estate for sale, rent, or financing should contain an equal housing opportunity logotype, statement, or slogan as a means of educating the public that the property is available to all persons regardless of race [or] color. . . .

(b) *Use of human models.* Human models in photographs, drawings, or other graphic techniques may not be used to indicate exclusiveness because of race, color, religion, sex, handicap, familial status, or national origin. If models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority and minority groups in the metropolitan area, both sexes, and, when appropriate, families with children. Models, if used, should portray persons in an equal

> social setting and indicate to the general public that the housing is open to all without regard to race, color, religion, sex, handicap, familial status, or national origin, and is not for the exclusive use of one such group.

Although plaintiffs plead a violation by the Times of § 3604(a) of the FHA, they make no effort in the briefs or oral argument to sustain it. Accordingly the Times' motion to dismiss that claim under Rule 12(b)(6) will be granted.

The question of substance relates to the viability of plaintiffs' claim that the Times' use of human models in the real estate advertisements it has published and continues to publish, as described in allegations I am bound on this motion to accept, violate § 3604(c) of the FHA and its accompanying HUD regulations.

The Times' main brief makes two basic arguments. First, the FHA and the regulations cannot be read to proscribe the advertisements at issue. Second, if the statute and regulations could be interpreted to bar a publisher from carrying such advertisements, the statutory and regulatory scheme would violate the First Amendment.

The Times' reply brief adds a third argument: the Act and regulations, if applied against a publisher of real estate advertisements to mandate its conduct, are impermissibly vague.

This Part of the opinion considers the first argument.

It is useful at the outset to recall the criteria for granting or denying a motion to dismiss under Rule 12(b)(6). It is not just that the complaint's factual allegations must be accepted as true. The motion to dismiss for failure to state a claim may succeed only if the face of the complaint, accepting the truth of its factual allegations, makes it appear "beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1947).

Applying these principles to the case at bar, the question is whether the Times has shown that plaintiffs can prove no set of facts in support of their claim that the Times' printing and publishing of real estate advertisements, as alleged in the complaint, "indicates any preference, limitation, or discrimination based on race [or] color", as prohibited by Section 3604(c) of the FHA. To support their claim that these advertisements have conveyed that prohibited indication, the individual plaintiffs would undoubtedly give testimony of their own perceptions and reactions consistent with the allegations of their complaint. One may also reasonably anticipate corroborative testimony from expert witnesses who "have done considerable academic and market research on the effect of the racial composition of advertising models on the consumer." *Saunders v. General Services Corp.*, 659 F.Supp. 1042, 1058 (E.D.Va. 1986) (complaint under § 3604(c) claiming that real estate development's use of brochure with "virtual absence of black models from the sixty-eight photographs in that brochure containing human models" indicated discriminatory preference in violation of the Act).

In order to prove a violation of this subsection, plaintiffs need not establish that the Times intended to express a racial preference. *Saunders v. General Services Corp.*, *supra*, at 1058, citing *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772 (1978). *See also Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1037 (2d Cir.1979). The ultimate issue for the finder of facts will be whether "[t]o an ordinary reader the natural interpretation of the advertisements published [in the newspaper] is that they indicate a racial preference in the acceptance of tenants." *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir.), *cert. denied*, 409 U.S. 934, 93 S.Ct. 235, 34 L.Ed.2d 189 (1972).

The Times does not argue that "advertisements" fall outside the reach of § 3604(c); nor could it do so, in the face of the statute's plain wording. "The Act makes it unlawful *inter alia* to publish any advertisement with respect to the sale or rental of housing that indicates any preference or limitation based on race or color. 42 U.S.C. § 3604(c). Clearly, then, the subject

matter of the lawsuit is covered by the statute." *Spann v. The Carley Capital Group*, No. 87-0054 (HHG), 1988 WL 166665 (D.D.C., December 13, 1988), at slip op. 5 (suit against owners of housing development).

Furthermore, the Times stops just short of contending that the statute does not apply to newspapers which print or publish advertisements alleged to be in violation of § 3604(c). Such a contention would be sufficiently answered by the Fourth Circuit's analysis in *United States v. Hunter, supra*, at 210:

> [§ 3604(c)] provides on its face no exceptions in favor of newspapers. Rather, it uses precisely the language which would lead the ordinary reader to conclude that newspapers are to be brought within its purview. The section provides it shall be unlawful "to make, print, publish, or cause to be made, printed, or published" any advertisement prohibited by the Act. In the context of classified real estate advertising, landlords and brokers "cause" advertisements to be printed or published and generally newspapers "print" and "publish" them. Since each phrase in a statute must, if possible, be given effect, *United States v. Menasche*, 348 U.S. 528, 538-539, 75 S.Ct. 513 [519-520,] 99 L.Ed. 615 (1955), both landlords and newspapers are within the section's reach.

The Times' first argument is more narrow. The contention is aptly summarized in the heading to the first point of its main brief: "the use of models of one race in display advertisements does not by itself indicate an illegal preference, limitation or discrimination based on race or color."

Again, one must remember the procedural context in which this argument is made. To obtain dismissal of the complaint for failure to state a claim, the Times must show that the pattern of real estate advertisements it has printed and published cannot be characterized as violative of the FHA *as a matter of law;* or, to put the case somewhat differently, plaintiffs could adduce no proof entitling the finder of facts to conclude that these advertisements indicated racial preference, limitation, or discrimination.

In support of its argument, the Times makes two contentions. First, it argues that the HUD regulations "are not mandatory and do not require a specific number of black models in advertisements." Main brief at 10. Second, the Times relies on caselaw which it says "does not support a finding of liability based solely on the ads." *Id.* at 14.

As to the regulations, the Times' argument is inaccurate in one significant aspect, and further flawed by the setting up of a straw man against whom the major thrust of its argument is directed.

The first sentence of the pertinent HUD regulation, 24 C.F.R. § 109.30(b), is mandatory. That sentence reads:

> Human models in photographs, drawings, or other graphic techniques may not be used to indicate exclusiveness because of race, color, religion, sex, handicap, familial status, or national origin.

By that sentence, which cannot reasonably be dismissed as only suggestive or precatory, the agency identifies human models as a means by which advertisements may indicate discriminatory preference; and, having identified that means, forbids its use. "May not" is the grammatical equivalent of the scriptural commandment "shalt not." That declaration by the agency charged with enforcing the statute is entitled to judicial recognition. *See Ragin v. Steiner, Clateman and Associates, Inc.*, 714 F.Supp. 709, 713 n. 3 (S.D.N.Y.1989) ("use of all white human model display advertising is contrary to HUD regulations which are entitled to deference"). *Cf. Hunter, supra*, at 215 n. 11:

> The Secretary of Housing and Urban Development has promulgated Advertising Guidelines for Fair Housing, 37 F.R. 6700 (April 1, 1972), which explicitly provide not only that newspapers are subject to the Act, but also that a phrase like "white home" is presumed discriminatory.

In *Saunders, supra,* at 1058, Judge Merhige cited that footnote in observing that the Fourth Circuit in *Hunter* also "cited HUD advertising guidelines as support for its position."

The second and third sentence of § 109.30(b) contain the word "should". "If models are used in display advertising campaigns", the regulation goes on to describe criteria which "should" be observed. These sentences, the Times argues, reduces the entire regulatory scheme to the level of suggestion, at least in respect of the use of human models. And the Times points to HUD's explanation of its regulations, appearing at 45 Fed.Reg. 57102:

> Civil rights organizations maintained that the language of the regulation should be mandatory throughout (substituting "must" for "should" in describing practices to be avoided or encouraged) and that the fair housing statement should be uniform and mandatory. Representatives of the media and financial institutions, on the other hand, objected to the issuance of the guidelines as a regulation, and to specific provisions of the regulation, as potential infringements on First Amendment rights.

The agency further said of the regulation as promulgated:

> It was the intent of this regulatory effort to produce a rule which represents a balance between (1) identification of practices which might be viewed as violations of Title VIII and (2) the limitations which the First Amendment may impose on mandatory restrictions relating to the publication of advertising.

Neither group prevailed entirely. Civil rights organizations did not achieve mandatory language "throughout" the regulations. The media and financial institutions, preferring the former "guidelines", lost their effort to avoid any form of regulation. What emerged is a regulation mandatory in its general prohibition of the use of human models as an indicator of discriminatory

preference, but suggestive in respect of particular "examples of advertising practices, content, etc., which might be indicative of violation of (or compliance with) Title VIII and which the Department will review and consider in investigating complaints alleging discriminatory housing practices involving advertising." 45 Fed. Reg. at 57102.

The distinction is important for Rule 12(b)(6) analysis. All I need consider at present is whether the agency regulations support or foreclose plaintiffs' claim that the Times' advertising practices, as described in the complaint, violate the statutory and regulatory scheme. Clearly the mandatory language in the first sentence of § 109.30(b) supports that claim. I do not regard the balance of the regulation as foreclosing it.

The Times' straw man argument assumes that plaintiffs interpret the regulations as requiring "a specific number of black models in advertisements." Main brief at 10. I do not understand plaintiffs to make that particular argument. Indeed, they specifically disclaim in their brief at 17 (n. 7), stressing instead their allegation "that the Times' practice of printing and publishing advertisements with virtually all human white models in a city with a significant population of blacks and other minorities violates the Act." This is the claim upon which Rule 12(b)(6) analysis must focus. To be sure, as an exercise to prepare for oral argument the Court instructed plaintiffs to draft the sort of injunction they would propose if successful on the merits; and the proposed injunction contains requirements for the inclusion of specified numbers of black models in advertising campaigns. But there is a difference between what regulations mandate or do not mandate, and the remedy a court of equity may fashion, assuming plaintiffs prevail at a trial on the merits. It is worth repeating that I am here concerned only with the legal sufficiency of plaintiff's claim.

Turning to caselaw, the Times relies upon *Saunders*, *supra*, and *Spann v. Colonial Village, Inc.*, 662 F.Supp. 541 (D.D.C. 1987). The "logic" of these two district court cases, it is said, "requires dismissal of the instant complaint." Main brief at 14.

Both parties at bar profess to find support in *Saunders*. Plaintiffs sued the owners of a real estate development for failure to include in their advertising an equal housing opportunity logo, and for the failure of their 38-page *Lifestyle* advertising brochure "to include an adequate number of black models, thereby impermissibly indicating a preference based on race." 659 F.Supp. at 1049. After trial, Judge Merhige found "that the natural interpretation of the *Lifestyle* brochure is to indicate that GSC apartment complexes are for white, and not black, tenants, thus discouraging blacks from seeking housing there", *id.* at 1058, leading to the Court's conclusion "that GSC's use of the *Lifestyle* brochure violated the [Fair Housing] Act", *id.* at 1059. Not much comfort for the Times in that.

But the Times finds comfort in what Judge Merhige said on the subject of the appropriate remedy. Plaintiffs in *Saunders*, as do plaintiffs at bar, sought both declaratory and injunctive relief (as well as money damages). Judge Merhige observed that the district courts "should not grant injunctive relief unless 'there exists some cognizable danger of recurrent violation.'" *Id.* at 1060 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953)). He then said:

> In the instant case, while declaratory relief is appropriate, the Court is not convinced that a cognizable danger exists that defendants will continue to violate their advertising obligations under the Act. In fact, although perhaps induced by the instant litigation, defendants have subsequently revised *Lifestyle* to increase the use of black models. Plaintiffs' own experts testified that the revised brochure did not indicate a racial preference. The Court finds that a declaratory judgment, combined with monetary damages, will adequately redress plaintiffs' injuries and provide assurances that defendants will not engage in future violations.
>
> In addition, the Court finds that plaintiffs are not entitled by law to force defendants to give proportional

> representation to blacks in their advertising, nor is there any evidence in the record that such representation would be necessarily required to avoid indicating a racial preference.
>
> *Ibid.*

It is this last paragraph which finds particular favor with the Times.

Viewed in context, the specific language relied upon by the Times deals with remedy, and not the legal viability of plaintiffs' claim. On that issue, *Saunders* supports plaintiffs at bar. That language also deals with requiring strict proportionality of black models in advertising, rather than reasonable representation (which the defendant in *Saunders* had implemented). The appropriate remedy in this instant case may be considered if plaintiffs succeed on the merits. But *Saunders* can hardly be said to support, much less "require", dismissal of the complaint under Rule 12(b)(6).

Spann v. Colonial Village, Inc. was an action by similarly situated plaintiffs against the owners of a housing development in the metropolitan Washington, D.C. area and its advertising agency. From January to April 1986, the apartment complex owner caused to be published advertisements in *The Washington Post* which featured exclusively white human models. Plaintiffs filed an administrative complaint with HUD in April 1986. Although the administrative complaint remained unresolved, the developer gave instructions to its advertising agency to change its policy. Judge Green found that during the ten-month period from April 1986 to February 1987, "at least thirty-six percent of Colonial's ads published in the *Post* have featured black models", and that during the 180 days immediately proceeding filing of the complaint in court, "28.6 percent of all of Colonial's ads in *The Post* featured a black model." The district court made comparable findings with respect to the defendant advertising agency. From January 1985 through May 1986, for various housing complexes, the agency placed advertisements depicting only white models. Administrative complaints were also filed against

the agency. Judge Greene found that during the 180-day period immediately proceeding the institution of suit, "thirty percent of the published, display ads made by Gerstin [the agency] featured black models, and forty percent of the Gerstin display ads published in *The Post* during that period featured one or more black models." 662 F.Supp. at 543.

Unappeased by these manifest changes in advertising policy, plaintiffs in *Spann v. Colonial Village* pressed their suit. Their theory appears to have been that the suggestive language in § 109.30(b) of the regulations, as well as the underlying statute, should "be construed to require proportional representation of the models of each race in all advertising", *id.* at 544.

Judge Greene rejected that theory; but the present defendant's reliance on *Colonial Village* is misplaced. As Judge Green explained, *Colonial Village* was a case "in which the number of black models used hovered between approximately thirty and forty percent; and...all of which included an equal housing opportunity slogan and logo." *Id.* at 544. Given that the population of Washington D.C. was approximately 27% black, no reasonable person could infer racial preference from such advertisements. The Court rejected plaintiffs' claim because it would essentially have required a flat rule of proportionality in every display advertisement:

> the Court would not be justified in construing section 3604 as establishing a flat rule requiring the use in ads of models of a particular race or sex in particular proportions.

Id. at 546.

The Court's ruling in *Colonial Village* is that, in circumstances where there is no genuine discrepancy between the percentage of black models used in an advertising campaign or practice and the percentage of blacks in the relevant community, the exact racial proportionality of particular advertisements alone will not support a claim under § 3604(c). Or, as Judge Greene explained and clarified in *Spann v. The Carley Capital Group,*

Colonial Village stands for the proposition "that if in real estate advertisements some photographs feature white models, some black models, and some of both, no violation of the Act occurs merely because the races are not represented proportionately to population, or because black models are not included in every display, unless an intention to discriminate is shown by extrinsic evidence." *The Carley Capital Group*, No. 87-0054(HHG), slip op. at 7.

In the case at bar, plaintiffs do not limit their claim to a lack of strict proportionality in the representation of races, as did the plaintiffs in *Colonial Village*. Instead, plaintiffs allege display ads featuring thousands of human models "of whom virtually none were black"; ads where potential renters were white and the service staff was black; ads displaying "virtually all white human models"; ads with all white models for buildings in predominantly white communities; and ads with all black models in predominantly black communities.

I do not construe the FHA and the regulations to prohibit *only* the total exclusion of black models. The statute is remedial. So narrow a construction is inappropriate. Between the polar extremes of total exclusion, and strict proportionalism according to population percentages, the proof at trial may show sufficient numbers of black models to achieve fair representation; or such a paucity of black models as to constitute "tokenism." The factfinder could, in my judgment, lawfully conclude that proof of the former does not violate the FHA; but that proof of the latter does offend a statute prohibiting advertisements which indicate a racial preference. What the proof will actually show – polar extremes in respect of particular advertising campaigns, or midpoints along the spectrum – is for discovery and trial.

The cases support these concepts of violative conduct. Judge Greene explicitly recognized in *Carley Capital Group* that the total exclusion of black models would take the case out of his ruling in *Colonial Village*. Thus he added in *Carley:*

> Plaintiffs claim – at this stage of the proceedings without contradiction – that during the periods of time covered by the complaints, advertisements were published by defendants that failed to include a single black model, and that in other respects as well intentional racial discrimination occurred. On this basis, there is no warrant for dismissing the complaints, in whole or in part.

Slip op. at 7. Judge Sand of this Court reached the same conclusion in *Ragin v. Steiner, Clateman and Associates, Inc., supra,* when he denied defendants' motion for summary judgment on plaintiffs' § 3604(c) claim. The defendants relied on Judge Greene's opinion in *Colonial Village;* but Judge Sand rejected the argument for reasons fully applicable here:

> *Spann,* however, is entirely distinguishable from a case in which only all white models appear in advertising. In *Spann,* during the relevant period, defendants ran ads with both white and black models. Judge Greene held that § 3604(c) did not require a flat rule of mathematical proportionality and that the Fair Housing Act was not violated merely because models of a particular race were not used in one ad or series of ads. *Id.* at 546. Judge Greene has himself distinguished this circumstance from one in which only white models have been consistently used. *Spann v. The Carley Capital Group,* No. 87-0054, slip op. at 7 (D.D.C., Dec. 13, 1988). We see no basis for dismissing the § 3064(c) claim.

714 F.Supp. at 713 (footnote omitted).

The "tokenism" concept of conduct violating § 3604(c) may be detected in *Saunders v. General Services Corp., supra.* In *Saunders,* Judge Merhige concluded, after a bench trial, that the "virtual absence" of black models from a promotional brochure indicated racial preference and thus violated § 3604(c). 659 F.Supp. at 1058. In that case, the Court was confronted with a 38-page brochure that included sixty-eight photographs

containing human models. Virtually none of the models were black. The Court's task as fact-finder was to "determine from the conflicting evidence whether the *Lifestyle* brochure's *paucity of black models* indicates a racial preference to the ordinary reader." *Id.* at 1058 (emphasis added). The Court concluded:

> Thus, the Court finds that the natural interpretation of the *Lifestyle* brochure is to indicate that [defendant's] apartment complexes are for white, and not black, tenants, thus discouraging blacks from seeking housing there.

Id. at 1058.

Because plaintiffs state a claim which their proof at trial may sustain, defendant's Rule 12(b)(6) motion fails.

III.

Alternatively, the Times argues that if the statutory and regulatory language is interpreted to bar a newspaper from publishing the sort of advertisements alleged in the complaint, the FHA would violate the First Amendment. That is so, the Times argues, because the First Amendment does not permit government to require a publisher to monitor and enforce the laws or to regulate the content of published material, particularly where advertisements "are not discriminatory on their face and only very indirectly affect housing transactions." Main brief at 20, 29.

The flaw in the Times' constitutional argument lies in the nature of the plaintiffs' claim. Plaintiffs claim that the Times published and publishes advertisements which indicate discriminatory preference in housing. These kind of advertisements further an illegal commercial activity: racial discrimination in the sale or rental of real estate. I have concluded under Point II that plaintiffs' claim may not be dismissed under Rule 12(b)(6). If the fact finder accepts plaintiffs' claim after trial, the Times will be found to have published advertisements that further illegal activity. That would dispose of the Times' constitutional defense, since commercial speech concerning unlawful activity is not protected by the First

Amendment. *Posadas de Puerto Rico v. Tourism Company*, 478 U.S. 328, 340, 106 S.Ct. 2968, 2976, 92 L.Ed.2d 266 (1986); *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980) ("The government may ban . . . commercial speech related to illegal activity . . ."); *Pittsburgh Press Co. v. Human Relations Commission*, 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973). *See also Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 496, 102 S.Ct. 1186, 1192, 71 L.Ed.2d 362 (1982) ("The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed 'speech,' then it is speech proposing an illegal transaction, which a government may regulate or ban entirely").[1]

While these and other Supreme Court cases stand for the same general proposition, *Pittsburgh Press Co.* is closest on the facts. The defendant published a newspaper in Pittsburgh which maintained a sex-designated classification system for help-wanted advertisements. There was a "Jobs – Male Interest" column and a "Jobs – Female Interest" column. A local ordinance forbade employers, employment agencies or labor organizations from publishing or causing to be published any advertisement indicating discrimination because of sex; and forbade all other entities from aiding such unlawful acts. Faced with prosecution under that ordinance, the newspaper publisher sought refuge in the First Amendment. The Court rejected the argument:

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[1] Defendant New York Times is entitled to no greater First Amendment protection than a real estate owner, an advertiser or any other person. "[D]espite its separate protection by the first amendment, the prevailing view is that the press enjoys no special status under the Constitution." Tribe, *American Constitutional Law*, 963 (2nd ed. 1988); *see also* Anderson, "The Origins of the Press Clause," 30 U.C.L.A.L.Rev. 455, 456 and n. 8 (1983) ("[t]hus far the Supreme Court . . . has refused to give the press any more protection than an individual enjoys under the speech clause") (cases cited therein). Thus, while the press is protected from invidious discrimination because of the Freedom of Press Clause, *see* Tribe at 963 n. 63, the press is treated like any other person for purposes of free speech analysis and for purposes of the commercial speech doctrine.

> Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned "Narcotics for Sale" and "Prostitutes Wanted" rather than stated within the four corners of the advertisement.
>
> The illegality in this case may be less overt, but we see no difference in principle here.

413 U.S. at 388, 93 S.Ct. at 2560 (emphasis in original) (footnote omitted).

The Times seeks to distinguish *Pittsburgh Press* because the publisher contributed the discriminatory employment column headings, which the Times characterizes as "a far cry from the signals allegedly emitted by the race of models in real estate ads, carried by a passive publisher." Main brief at 22 n. 8. The Times also stresses that in *Hunter, supra*, the apartment offered for rent was described by the advertisement as being in a "white home." Those differences are not controlling. Illegality may be more or less overt. Publishers may be relatively "active" or "passive." But caselaw holds and common sense confirms that consistent use of exclusively or near-exclusively white models may operate as the functional equivalent of more explicit verbal racial messages. If the Times' argument is that "passive" publishers should not be subject to the Act, that argument must be addressed to Congress, not the courts.

The Times relies upon *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), for the proposition that the Act impermissibly casts upon the press the governmental obligation of monitoring discriminatory advertising. In *Bigelow*, the Supreme Court reversed the criminal conviction of an underground newspaper for publishing an advertisement encouraging abortion. But *Bigelow* is inapposite because abortion

is constitutionally protected whereas housing discrimination is illegal. The Court stressed that distinction in *Posadas de Puerto Rico Associates, supra.* In *Posadas* a local statute legalized casino gambling in licensed places to promote tourism, but also provided that no gambling room could advertise their facilities to the public of Puerto Rico. The plaintiffs, hotel and casino owners, challenged the facial constitutionality of the statute and accompanying regulations on First Amendment grounds, relying on *Bigelow* and *Carey v. Population Services International,* 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) (striking down a ban on any advertisement or display of contraceptives). Rejecting the argument, the Court said in *Posadas:*

> We think appellant's argument ignores a crucial distinction between the *Carey* and *Bigelow* decisions and the instant case. In *Carey* and *Bigelow,* the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State. Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and *Carey* and *Bigelow* are hence inapposite.

478 U.S. at 345-46, 106 S.Ct. at 2979.

So in the case at bar, the undoubted power of Congress to ban discrimination in housing necessarily includes the lesser power to ban advertising which indicates a discriminatory preference.

Relying on *News & Sun-Sentinel Company v. Board of County Commissioners,* 693 F.Supp. 1066 (S.D.Fla.1987), the Times contends that monitoring real estate advertisements for indications of racial preference would place an undue burden upon publishers. Plaintiff publisher in *News & Sun-Sentinel Company* attacked a local ordinance making it a misdemeanor to publish an advertisement for contracting services unless the ad

included the contractor's "certificate of competency" number. The ads in question were classified service advertisements, phoned in to the newspaper publisher at the rate of four hundred each day. The district judge was impressed by the many additional steps and effort that would be required by the publisher to ensure proper compliance with the ordinance. 693 F.Supp. at 1068. It is not clear that monitoring real estate advertisements for indications of discriminatory preference would be so onerous. *The Washington Post*, a newspaper of some consequence in a metropolis of some size, had no difficulty in agreeing with comparable plaintiffs to require specified black representation in different kinds of advertisements; recordkeeping of real estate display sections for three years; and enforcement by means of notices to advertisers, monitoring compliance, and prohibition of advertisements if the advertiser did not comply, all the while keeping copies of such notices for plaintiffs' inspection. I have a parochial reluctance to conclude that what the *Washington Post* can do to eliminate all the ads unfit to print, the *New York Times* cannot do.

Again, within the Rule 12(b)(6) context it is not necessary to address in detail the relief to which plaintiffs at bar might be entitled if they prevail at trial. It is sufficient for present purposes to say that the First Amendment does not bar the claim as a matter of law.

IV.

The Times' final argument with respect to the FHA, raised in its reply brief, is that the statute and regulations, if applied against a publisher of real estate ads to require a certain number of black models, are impermissibly vague. The Times relies upon *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972) and its progeny, including *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) and *Hynes v. Mayor of Oradell*, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976).

All three cases involved criminal statutes infringing on political speech. *Grayned* concerned anti-picketing and anti-noise

ordinances under which students protesting race issues were arrested and convicted. In *Smith* the Court struck for vagueness a Massachusetts flag-misuse statute that imposed criminal sanctions for treating the flag "contemptuously", under which a man was incarcerated for wearing a small cloth version of the flag sewn to the seat of his trousers. In *Hynes* the Court struck for vagueness an ordinance requiring that advance notice be given by any person seeking to solicit door-to-door for political campaigns or causes, on pain of imprisonment and fines.

The relevance of the "void-for vagueness" doctrine to the case at bar is problematical. The doctrine is most clearly identified with criminal law, deriving its origins from procedural due process: the citizen's fundamental right to know in advance and with precision the type of behavior that may result in criminal penalties. The doctrine is also closely associated with the First Amendment Right to engage in protected political speech and conduct. The case at bar, however, does not involve a criminal prosecution of political speech. Rather, it involves a civil suit between private parties involving commercial speech. The Times does not cite, and this Court's research has not disclosed, a case applying or undertaking to define the concept of vagueness in the context of a civil suit involving commercial speech.

Assuming without deciding that the doctrine is applicable, the FHA passes muster. A violation of § 3604(c) occurs if the natural interpretation of the advertisements "to the ordinary reader" is that they indicate a racial preference in the acceptance of housing purchasers or tenants. *U.S. v. Hunter, supra*, at 215. The "ordinary reader" is nothing more, but nothing less, than the common law's "reasonable man": that familiar creature by whose standards human conduct has been judged for centuries. For comparable reasons, Justice Holmes upheld the Sherman Act's "rule of reason" standard against a challenge for vagueness:

> [T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine

> or a short imprisonment, as here; he may incur the penalty of death. *Nash v. United States,* 229 U.S. 373, 377, 33 S.Ct. 780, 781, 57 L.Ed. 1232 (1913).

I agree with the Fourth Circuit's observations in *Hunter* at 213 that:

> a newspaper publisher can easily distinguish between permissible and impermissible advertisements in discharging his duty to reject those that violate § 3604(c).... However the language of the advertisement is couched, the purpose of an advertiser who wishes to publish an advertisement in violation of the Act is to communicate his intent to discriminate and a newspaper publisher can divine this intent as well as any of his readers.

That is true of language. It is equally true of a picture, that formidable alternative form of speech which the Chinese regard as the potential equivalent of 10,000 words.

There is no constitutional due process bar to plaintiffs' claim.

V.

The Times is entitled to an order dismissing plaintiff's claims under 42 U.S.C. §§ 1981 and 1982, and the Thirteenth Amendment.

Section 1981 reads:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1982 reads:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

These provisions were enacted pursuant to the grant of authority to Congress contained in the Thirteenth Amendment. They are companion statutes in that they both derive from the same legislative history, Section 1 of the Civil Rights Act of 1866, and are to be construed and treated together. *Runyon v. McCrary*, 427 U.S. 160, 170, 96 S.Ct. 2586, 2594, 49 L.Ed.2d 415 (1976); *see also Patterson v. McLean Credit Union*, ____ U.S. ____, 109 S.Ct. 2363, 2372, 105 L.Ed.2d 132 (1989) (construing § 1981 in light of § 1982, the "companion statute").

The Times maintains that discrimination in the advertising of real estate is not actionable under either §§ 1981 or 1982. The weight of authority supports defendant's position. Accordingly, these claims will be dismissed.

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), which held that § 1982 reaches private conduct, the Court defined the statute's scope. In particular, the Court indicated that § 1982 does not reach discrimination in advertising. The Court wrote:

> Whatever else it may be, 42 U.S.C. § 1982 is not a comprehensive open housing law. In sharp contrast to the Fair Housing Title (Title VIII) of the Civil Rights Act of 1968, Pub.L. 90-284, 82 Stat. 81, the statute in this case deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin. It does not deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling. *It does not prohibit advertising or other representations that indicate discriminatory preferences.*

392 U.S. at 413, 88 S.Ct. at 2189 (emphasis added) (footnote omitted). After each sentence, the Court dropped a footnote contrasting § 1982 with the Fair Housing Act. After the last sentence just quoted, the Court noted: "Contrast §§ [3604](c), (d), (e)." *Id.* at 413 n. 8, 88 S.Ct. at 2189 n. 8.

The Court's statement in *Jones* may arguably be regarded as *dictum*; however, given the source, it is persuasive. As has every other court considering the issue, I dismiss plaintiffs' claims under §§ 1981 and 1982. *Saunders v. General Services Corp.*, 659 F.Supp. at 1063; *Spann v. Colonial Village, Inc.*, 662 F.Supp. at 547; *Ragin v. Steiner, Clateman and Associates*, 714 F.Supp. at 713-714.

Despite plaintiffs' contentions, the Supreme Court's recent decision in *Patterson v. McLean Credit Union, supra*, does not support their claim under §§ 1981 and 1982. Plaintiffs contend that *Patterson* reinterpreted the scope of § 1981 to apply only to the formation stage of a contract. Relying on a passage of the opinion that states "[§ 1981] prohibits, when based on race, the refusal to enter into a contract with someone, *as well as the offer to make a contract only on discriminatory terms.*" *id.* 109 S.Ct. at 2372, plaintiffs argue that advertisements pertain to the formation stage of the contract and are thus covered by § 1981.

Plaintiffs' argument is without merit. In *Patterson v. McLean Credit Union*, the Court held that a claim for racial harassment after the contractual relationship of employment has been established is not actionable under § 1981. The Court emphasized that § 1981 only covers conduct at the initial formation of the contract, and conduct that impairs the right to enforce contract obligations through the legal process. *Id.* 109 S.Ct. at 2374. Clearly, the holding in *Patterson* does not help the plaintiffs. Nor does the rationale of *Patterson* favor plaintiffs. Relying on *Jones v. Alfred H. Mayer Co.*, the Court in *Patterson* declared:

> The most obvious feature of [§ 1981] is the restriction of its scope to forbidding discrimination in the "mak[ing] and enforce[ment]" of contracts alone.

> Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief. Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts.

Patterson, 109 S.Ct. at 2372. This statement clearly runs counter to plaintiffs' contentions.

If anything, as Judge Sand points out in *Ragin v. Steiner, Clateman and Associates, supra*, the decision in *Patterson* is relevant here because of "the Supreme Court's approach to interpretation of § 1981 in which it expressed a reluctance 'to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute.' " 714 F.Supp. at 713 (*quoting Patterson*, 109 S.Ct. at 2375).

VI.

For the foregoing reasons, defendant's motion to dismiss the complaint insofar as it asserts claims under 42 U.S.C. §§ 3604(a), 1981, and 1982 is granted. The motion to dismiss plaintiffs' claim under 42 U.S.C. § 3604(c) is denied.

I will, if asked by either party, give consideration to certifying this opinion and order for interlocutory appeal under 28 U.S.C. § 1292(b). In saying that, I intimate no view on whether the certification would issue if requested. The question would have to be addressed in further briefs.

The parties are directed to attend a further status conference in Room 307 on January 12, 1990 at 3:30 p.m.

It is SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LUTHER M. RAGIN, JR., DEBORAH FISH RAGIN, RENAYE B. CUYLER, JEROME F. CUYLER, OPEN HOUSING CENTER, INC., and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,	89 Civ. 0228
Plaintiffs,	COMPLAINT Jury Trial Demanded
v.	
THE NEW YORK TIMES COMPANY,	
Defendant.	

COMPLAINT

1. This is an action for a declaratory judgment, permanent injunctive relief, compensatory and punitive damages, costs and attorneys' fees, challenging a longstanding, continuing and profitable practice by The New York Times Company (the "Times") of publishing racially discriminatory advertisements for housing in violation of the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 *et seq.*, as amended, the Civil Rights Act of 1866, 42 U.S.C. §§ 1981 and 1982, and the Thirteenth Amendment of the United States Constitution.

Jurisdiction and Venue

2. The Court's jurisdiction over this action is conferred by 28 U.S.C. §§ 1331, 1337, 1343(a)(4), 2201, and 2202.

3. Venue is founded on 28 U.S.C. §§ 1391(b) and (c) and is proper because the claims arose in this district; defendant resides in this district and defendant makes, prints, publishes and

distributes, or causes to be made, printed, published and distributed, the racially discriminatory and preferential advertisements in this district.

Parties

4. Plaintiffs Luther M. Ragin, Jr. and Dr. Deborah Fish Ragin (the "Ragins") are black persons and citizens of the United States who have been looking for housing in the New York City metropolitan area. The Ragins reside at 160 Cabrini Boulevard, New York, New York 10033.

5. Plaintiffs Renaye B. Cuyler and Jerome F. Cuyler (the "Cuylers") are black persons and citizens of the United States who have been looking for housing in the New York City metropolitan area. The Cuylers reside at 233 Lincoln Road, Brooklyn, New York 11225.

6. Plaintiff Open Housing Center, Inc. (the "Open Housing Center") is a not-for-profit corporation organized under the laws of the State of New York with its office at 150 Fifth Avenue, New York, New York 10011. One of the Open Housing Center's primary purposes is to promote equal opportunity in housing in the New York metropolitan area. Its goals include the elimination of unlawful racially discriminatory housing practices that cause injury to its clients, to all persons who seek to rent or buy housing units in the metropolitan area and to all persons who reside in the metropolitan area. The Open Housing Center seeks to assure to all such persons the housing of their choice and the right to the important social, professional, business, economic and political benefits of interracial associations that arise from living in integrated communities. The Open Housing Center's activities include, but are not limited to, the following:

(a) Assisting and aiding individuals of all races in obtaining equal access to housing throughout the New York metropolitan area without regard to race, creed, color, national origin, sex, sexual preference, marital status or physical disability.

(b) Conducting a Housing Counseling and Relocation Service for New York companies through, at present, a wholly-owned subsidiary. The program has been in existence for the past fourteen years. Some thirty-five major corporations arrange with the service to help their employees, both black and white, find housing.

(c) Preparing and distributing information on housing in all boroughs of New York City.

(d) Investigating allegations of discrimination and taking such steps as necessary to ensure equal opportunity and to counteract and eliminate racially discriminatory housing practices.

7. Plaintiff National Association for the Advancement of Colored People ("NAACP") is a not-for-profit membership organization organized under the laws of the State of New York. It has offices at 260 Fifth Avenue, 6th floor, New York, New York 10001. The principal purpose of the NAACP is to eliminate all forms of racial discrimination against its members and other black citizens of the United States. Many of the members of the NAACP reside in the New York metropolitan area. The goals of the NAACP in the New York metropolitan area include, among other things, achieving integrated housing and protecting the rights of its members to contract for the rental or purchase of housing on an equal basis without racial restrictions, limitations or preference.

8. Defendant the Times, a newspaper company located at 229 West 43rd Street, New York, New York 10036, makes, prints, publishes and distributes, or causes to be made, printed, published and distributed, a publication entitled *The New York Times*. The Times prints and publishes discriminatory display advertisements for the sale or rental of apartments, condominiums, cooperatives and/or single family homes in this newspaper. Prior to publication, it reviews, approves and accepts for publication these advertisements. The Times receives substantial fees for publishing these discriminatory advertisements.

Facts

9. On April 11, 1968, Congress enacted the Fair Housing Act (the "Act"), which provides that "it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States". Fair Housing Act, 42 U.S.C. § 3601 (1983). The Act makes it unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
>
> * * *
>
> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

42 U.S.C. §§ 3604 (a) and (c) (1983).

10. In 1980, the United States Department of Housing and Urban Development ("HUD") promulgated regulations interpreting and enforcing the Act's proscriptions against discrimination in advertising. The HUD regulations state in part that:

> (a) *Use of Equal Housing Opportunity logotype, statement, or slogan.* All advertising of residential real estate for sale, rent or financing should contain an equal housing opportunity logotype, statement, or slogan as a means of educating the public that the property is available to all persons regardless of race, color, religion, sex, or national origin. . . .

> (b) *Use of human models.* Human models in photographs, drawings, or other graphic techniques may not be used to indicate exclusiveness on the basis of race, color, religion, sex, or national origin. If models are used in display advertising campaigns, the models should be clearly definable as reasonably representing majority and minority groups in a metropolitan area and both sexes. Models, if used, should portray persons in an equal social setting and indicate to the general public that the housing is open to all without regard to race, color, religion, sex, or national origin, and is not for the exclusive use of one such group.

24 C.F.R. § 109.30 (a) and (b) (1987) (the "HUD regulations"). In 1972, HUD published guidelines to the same effect.

11. Since 1968, many real estate display advertisements appearing in *The New York Times* have contained pictures of human models. They appear in *The Sunday New York Times* Real Estate Section, *The New York Times Sunday* Magazine section and the real estate section of the daily paper. *The New York Times* daily edition has a circulation of approximately 1.5 million and the Sunday edition (the "Sunday Times") has a circulation of approximately 1.6 million.

12. At least 20% of the population of New York City's five boroughs is black. During the twenty year period since the Act was passed prohibiting discriminatory advertisements, display advertisements appeared in the Sunday Times featuring thousands of human models of whom virtually none were black. Despite the statutory prohibitions, while many of the white human models depict representative or potential home owners or renters, the few blacks represented are usually depicted as building maintenance employees, doormen, entertainers, sports figures, small children or cartoon characters.

13. In addition, the real estate advertisements which are printed and published in *The New York Times* violate the logotype requirements set forth in the HUD regulations at 24

C.F.R. § 109.30(a). Until the latter part of 1987, virtually none of these display advertisements contained any equal housing opportunity logotype or statement. While logotypes have appeared in some real estate advertisements during this past year, few of these have conformed with the size requirements of the regulations.

14. On or around September 1987, plaintiffs' counsel met with lawyers for the Times and advised them that the Times was printing and publishing discriminatory advertisements in violation of the Act, the Civil Rights Act of 1866 and the HUD regulations concerning human models and logotypes. During that meeting, plaintiffs' counsel asked the Times to sign an agreement similar to the one entered into by the *Washington Post*, a copy of which is attached as Exhibit 1. The Times refused to do so.

15. On or about February 16, 1988, the Times published a notice addressed to all advertisers who placed advertisements in the New York Times, a copy of which is attached as Exhibit 2. This notice states that:

> Effective January 1, 1988, the Times will require that all real estate display ads include the "Equal Housing Opportunity" tag line recommended by the federal regulations. Ads which fail to include this statement will be rejected.

16. On or about February 16, 1988, the Times also published a pamphlet of its standards for acceptable advertising, a copy of which is attached as Exhibit 3. In this pamphlet, the Times states that it will not accept:

> Advertisements which fail to comply with the express requirements of federal and state laws against discrimination, including Title VIII and the Fair Housing Act, or which otherwise discriminate on grounds of race, religion, national origin, sex, age, marital status or disability.

17. The Times, however, did not ask advertisers to stop submitting advertising campaigns with all-white human models.

18. Since February 16, 1988, the Times has continued to print or publish or has caused to be printed or published advertisements that contain virtually all white human models and that violate the size standards for Equal Housing Opportunity logotypes. Similarly, during this period the Times has continued to print and publish numerous advertisements that picture all-white models in advertisements for realty located in predominately white buildings, developments, communities or neighborhoods. It has also printed and published a few advertisements that picture all black models in advertisements for realty located in predominately black buildings, developments, communities or neighborhoods.

19. The use of human models in advertising personalizes the advertisements and encourages consumers to identify themselves in a positive way with the models and housing featured. In real estate advertisements, human models often represent actual or potential purchasers or renters, or the type of potential purchasers or renters that the real estate owner has targeted as desirable occupants.

20. Therefore, the repeated and continued depiction of white human models and the virtual absence of any black human models in the real estate advertisements that the Times has continuously printed and published, or caused to be printed and published throughout the last twenty years, indicates a preference on the basis of race and color in violation of the law.

21. The real estate display advertisements featured by the Times indicate a preference based on race through the use of human models reflecting the predominant race of the advertised building, development or community.

22. In light of the Times' continuing and longstanding practice of printing and publishing racially discriminatory advertisements, plaintiffs believe the Times has intentionally and maliciously violated their civil rights.

23. The Ragins and Cuylers have looked at human model real estate advertisements in *The New York Times* and have been injured and offended by those advertisements due to their clear indication of a preference, limitation and discrimination based on race.

24. As a result of these racially preferential advertisements appearing in *The New York Times*, the Ragins and the Cuylers have been deprived of their rights to non-preferential advertising for housing and of their rights to contract for the sale or rental of housing on an equal basis with other people without restriction or limitation based on race or color. They have also suffered indignation and distress as a result of this deprivation.

25. In addition, the Times' preferential advertising has: 1) interfered with the efforts of the Open Housing Center and the NAACP to bring about equality of opportunity for minorities and others in housing; 2) forced the Open Housing Center, the NAACP and their attorneys to devote their scarce resources to identify and counteract the Times' advertising practices; 3) interfered with the rights of the Open Housing Center and the NAACP members and constituents to receive information regarding housing which is free from indications of racial preference; 4) interfered with the rights of the Open Housing Center and the NAACP members and the constituents to enjoy the benefits of living in an integrated society; and 5) denied and interfered with the rights of the members and constituents of the Open Housing Center and the NAACP to contract on equal terms for the rental and sale of housing without restriction or limitation based on race or color.

Count I

26. Plaintiffs incorporate Paragraphs 1 through 25, as if fully pleaded herein.

27. The Times' real estate display advertisments violate the rights of plaintiffs' guaranteed by the Fair Housing Act of 1968, 42 U.S.C. § 3604 (a) and (c) by 1) indicating a racial preference or limitation through the almost exclusive use of white human

models; 2) using white human models in numerous advertisements for realty located in predominantly white buildings, developments, communities or neighborhoods; 3) using black human models in advertisements for realty located in predominantly black buildings, developments, communities and neighborhoods; and 4) discouraging housing applicants from looking at realty because of race or color of the human model featured.

Count II

28. Plaintiffs incorporate Paragraphs 1 through 25, as if fully pleaded herein.

29. The Times' real estate advertisements violate the rights of plaintiffs' guaranteed by the Civil Rights Act of 1866, 42 U.S.C. § 1982, the Civil Rights Act of 1870, 42 U.S.C. § 1981, and the Thirteenth Amendment of the United States Constitution by 1) indicating a racial preference or limitation through the almost exclusive use of white human models; 2) using white human models in numerous advertisements for realty located in predominantly white buildings, developments, communities or neighborhoods; 3) using black human models in advertisements for realty located in predominantly black buildings, developments, communities and neighborhoods; 4) discouraging housing applicants from looking at realty because of the race or color of the human model featured; 5) interfering with and denying the right to contract on equal terms for the rental and sale of housing without restriction or limitation based on race or color; and 6) promoting the badges and incidents of slavery through the almost exclusionary use of white models.

WHEREFORE, plaintiffs pray that the Court enter a judgment:

(a) Declaring that the Times has violated the Fair Housing Act of 1968, 42 U.S.C. § 3604 (a) and (c), the Civil Rights Act of 1866, 42 U.S.C. § 1982, the Civil Rights Act of 1870, 42 U.S.C. § 1981, and the Thirteenth Amendment of the United States Constitution;

(b) Enjoining the Times, its employees, agents, representatives, successors and assigns, and all persons in active concert, combination and participation with any of them, from further violating any of the above laws;

(c) Ordering the Times to take such affirmative steps as are necessary to restore the victims of its unlawful practices to the positions they would have been in but for the Times' discriminatory conduct, and to assure that the Times' future real estate advertisements are in full compliance with the law;

(d) Awarding plaintiffs appropriate compensatory and punitive damages, expenses and the attorneys' fees incurred in connection with this action; and

(e) Awarding plaintiffs such additional relief as the interests of justice may require.

Dated: New York, New York
January 12, 1989

Respectfully submitted,

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